

EXPANDING INTELLECTUAL PROPERTY

Copyrights and Patents in
Twentieth-Century Europe
and Beyond

EDITORS
HANNES SIEGRIST
AUGUSTA DIMOU

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*Copyrights and Patents in
Twentieth-Century Europe and Beyond*

Edited by
HANNES SIEGRIST and AUGUSTA DIMOU



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Introduction

HANNES SIEGRIST and AUGUSTA DIMOU

The contentious character of Intellectual Property (IP) is as old as the institution itself. In the last two centuries, international intellectual property law has been intent on stabilizing conflicting and mutating socio-economic, cultural, technological and power relations while also being indelibly shaped by them. At present, both the digital revolution and globalization are lending a new, dynamic twist to those tensions as they are reshuffling the balance of power of the global IP regime. Faced with the unprecedented expansion of the scope and subject matter of copyrightable material, from the life sciences and biotechnology to native people's cultural heritage, nothing seemed more pertinent at the dawn of the twenty-first century than to examine the historical expansion of Intellectual Property Rights (IPRs) in the preceding centuries. The current volume therefore focuses on the diverse forms, strategies, mechanisms and patterns of IP expansion in the twentieth century and is concerned with the following central questions: 1) How do institutions expand at the interface between national, international, transnational, and global constellations of interests? 2) What forms does this expansion take? And 3) How are national and international stakeholders brought to endorse, promote, modify or resist such developments?

This volume deals with the expansion and institutionalization of intellectual property norms in Europe and beyond in the twentieth century. The chapters included are predominantly the result of an international conference that took place at the Leipzig Centre for the History and Culture of East Central Europe (GWZO) in November 2012 within the framework of the research group "Legal Cultures in 20th Century East-Central Europe: Material and Immaterial Property Rights," which was sponsored by the

German Federal Ministry of Education and Research (BMBF) under the academic supervision of Hannes Siegrist and Stefan Troebst.¹ Envisioned as a dialogue across disciplines, the volume unites the studies of history, law, legal history, political science, and the history and sociology of art. In line with newer approaches in the field of legal studies, we approach law as something more than a system of rules enforced through social institutions with the intention to guide and regulate human conduct. Our focus has rather been on the interaction between law, culture, and society and the volume therefore has a strong historical and sociological overtone. In a similar vein to that argued by Clifford Geertz, we regard law as not merely ordering things in the world but also defining and creating them.² Rather than consider law and culture as autonomous and independent semiotic and social systems, we view them as interpenetrating and constitutive of each other. Finally, in conceiving this endeavor, we have applied the concept of “legal culture,” seeking “to explore empirical variations in the way law is conceived and lived rather than to establish universal truths about the nature of law.”³

The volume’s twelve chapters therefore elucidate “law in context” and revolve around the transfer and adaptation as well as the ambivalence of legal transplants in their interaction with national and international projects, systems, regimes, trends, and contexts. The contributions discuss the institutionalization of copyright and patent law and the correlation with major political periods and socioeconomic systems of the twentieth century such as National Socialism, the interwar period, capitalism, real socialism and postsocialism. They point at processes of enculturation, transnationalization and universalization of norms, as well as practices of incorporation and defiance. While some chapters target questions about continuities and discontinuities in historical development, others concentrate on competing historical trajectories and lay open the processes through which normativity and standardization are achieved. For the

¹ A detailed description of the project “Rechtskulturelle Prägungen Ostmitteleuropas in der Moderne: Produktionseigentum, Geistiges Eigentum, Bodeneigentum” can be found at http://research.uni-leipzig.de/gwzo/index.php?option=com_content&view=article&id=665&catid=89.

² Clifford Geertz, *Local Knowledge* (London: Fontana Press, 1983); particularly Chapter 8: “Local Knowledge: Fact and Law in Comparative Perspective.”

³ David Nelken, “Using the Concept of Legal Culture,” *Australian Journal of Legal Philosophy* 29 (2004): 2.

most part, the essays underscore the role and activity of the respective stakeholders in the establishment and validation of IP norms and regimes, from the function of experts and the creation of expert cultures to the compelling power of popular street protests. Finally, the volume offers a rare perspective on the development of IP in East-Central Europe in the context of, and in comparison to, broader European and international trends.

Why deliberate on the *notion of expansion*? If there is something truly interesting and intriguing about expansion beyond habitual preoccupations with power and hegemony, this rests undoubtedly with the variability and inventiveness of its strategies, the volatility of its nature and rhetoric and the interchangeability of its contending positions. As a consequence, in this volume we approach the concept of expansion—precisely as that of IP—from a multifunctional and polyvalent perspective. Intellectual Property Rights are understood to stand for an institution, a set of collective rules of operation, a symbolic order, a legal instrument, a power and legal regime but also for a metaphor and a narrative of social and cultural order. Correspondingly, as demonstrated by the diverse chapters of this book, expansion refers to multiple and complex processes of erecting boundaries of inclusion and exclusion in the fields of knowledge and culture. These take manifold and occasionally contradictory forms and are operationalized in diverse ways: e.g., by way of securing property-like monopolistic rights over resources but also by securing open access to property-less resources; through the shifting and relocation of venues or emphasis, e.g., from private law to criminal law or from a regime of culture to one of trade; through mastery and specialization of the subject matter; through state protectionism and the cartelization of interests; through narratives advocating major values such as liberalism, equity, justice or civilization; through the internationalization and universalization of norms either by enforcing regimes of compliance or by proposing attractive bargains of exchange; through appropriation, adaptation or hybridization; by switching alliances and roles; through contestation and juxtaposition of legal doctrines, just to mention a few of those strategies. The volume engages with these diverse views on expansion by offering a wide array of national and international case studies.

The historical milestones that established IPRs as a multifunctional and polyvalent institution of modernity are the focus of Hannes Siegrist's

introductory chapter. He offers a critical reading of both the master narratives and metanarratives of IPRs by examining their historical development from the eighteenth to the twenty-first centuries during the period of convergence between propertization, nationalization and globalization processes. Adopting a *longue durée* perspective, Siegrist connects the histories of material and immaterial rights and illuminates their common historical, cultural, rhetorical and legal backgrounds. Rights pertaining to tangible and intangible assets have converged, diverged, intersected and complemented each other in various ways during their respective historical paths. He examines the development of IPRs as the outcome of major and all-encompassing thrusts of socioeconomic, political, technological, legal and cultural change, and highlights the role of concrete stakeholders (interest and status groups, states, international organizations, etc.) and their agendas and explores how these processes were played out at the interfaces between state, interstate and transnational action. These interfaces in turn determined the dynamics and the hierarchy between the strategies of propertization, nationalization and globalization in conjunction with the historical materialization of different political and ideological projects. According to Siegrist, intellectual property *expands by structuring relationships of power, competition and cooperation, fostering as a consequence claims to both exclusion and inclusion*. The dynamics of these relationships however have not been stable but eminently volatile. Siegrist summarizes the key moments of these developments in ten compact theses, arguing in conclusion that in spite of the preponderance of the property paradigm, counter models asserting the multi-institutional regulation of culture, science and communication are, and have always been, part of the global history of culture and knowledge.

Jonas Görtz's chapter analyses the revision conferences of the Berne Convention (1967) and the Universal Copyright Convention (1971) and examines to what extent they symbolized the tug-of-war between the old and established union member states and the newcomer states of the decolonized Global South. This confrontation, which centered around the issue of ownership and access to global knowledge not only opened the way for new stakeholders but also reshuffled the core premises of the nominal and moral grounds on which global regulation was based. Görtz's contribution demonstrates the complex makeup and highly political

nature of international technocratic regimes even if they touch only indirectly or tacitly on international relations. It also discusses *IP expansion as governance*, looking at the way states produce, sustain and negotiate rules, norms and actions.⁴ Constituting an arena of power politics, international IP regulation is an instrument used by states to safeguard and promote state interests in a global environment. The power relationship is characterized by efforts to incorporate newcomers into specific regimes and induce them to accept and internalize customary rules and procedures. In the bickering between the First and the Third World and in the shifting between the Berne and Universal Conventions, Görtz's essay illustrates quite lucidly Helfer's concept of "regime shifting," that is, the attempts by alternative stakeholders "to alter the status quo ante by moving treaty negotiations, lawmaking initiatives, or standard-setting activities from one international venue to another."⁵ In that respect "regime shifting" encompasses a rich variety of moves among international lawmaking fora (both within and among discrete regime complexes) as well as expansions or shifts of issue area boundaries. So defined, regime shifting is a game that both strong and weak actors can play."⁶ The shifting of venues is a technique employed to modify boundaries and promote expansion.

Linking back to earlier philosophical debates on the nature of property and ownership, a series of the volume's chapters discuss *IP expansion as related to issues of identity and the confirmation of the self*. Both Hegel and Kant were among the earliest exponents of this view and drew attention to the institution of property and the development of agency.⁷ Chapters by both Katarzyna Gracz and Michael Birnhack discuss struggles, albeit from different historical and national contexts, over the reach and extension

⁴ For a discussion of the same power constellation with an emphasis on the global commons and the expansion of IP in the realms of folklore and cultural patrimony, see Isabella Löhr, "Wem gehört die Kultur? Die UNESCO zwischen geistigem Eigentum, Folklore und kulturellem Erbe in den 1960er und 1970er Jahren," in *Global Commons im 20. Jahrhundert: Entwürfe für eine globale Welt*, ed. Isabella Löhr and Andrea Rehling (Munich: Oldenbourg, 2014), 135–62.

⁵ Laurence R. Helfer, "Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking," *Yale Journal of International Law* 29 (2004): 14.

⁶ *Ibid.*, 17.

⁷ Jeremy Waldron, "Property and Ownership," *The Stanford Encyclopedia of Philosophy* (spring 2012 edition), ed. Edward N. Zalta, <http://plato.stanford.edu/archives/spr2012/entries/property/>.

of IP rights in relation to the notion of (national) community. This issue sees debates over IP rights transform from a purely technical and expert subject matter to become a symbolic struggle over notions of what constitutes the identity of the community. In certain political constellations IP is attributed a significant heritage that “invents a tradition” and which serves as a new interpretative framework for the collective. Katarzyna Gracz examines the reasons that led Polish citizens in 2012 to fervently oppose the adoption of the ACTA treaty and gives a *longue durée* explanation of the dispositions of the Polish public in the face of Polish historical experience with occupation and concomitant restrictions of access to learning, which apparently shaped distinct patterns of collective behavior toward knowledge and culture. Michael Birnhack demonstrates how a legal dispute over the rightful ownership of copyright to Theodor Herzl’s works and the bid to translate them into Hebrew could become so prominent in Israel of the 1950s and how such debates touched upon the very heart of the argument of what constitutes Jewish identity.

The instrumental role of expert courts in promoting design as an object of copyright protection in twentieth-century Denmark is the focus of Stina Teilmann-Lock’s chapter. She analyses how the inclusion of design experts in infringement cases traced the path from expert opinion statements to statutory law. The circle of “Danish Modern” designers in particular had a crucial impact on the direction of design copyright in Denmark both in terms of the scope of copyright protection for applied art and the very notion of “design” that deserves such protection. By reconciling the functional and nonfunctional—or the applied arts and the fine arts— court-appointed experts wielded enormous influence over the direction and expansion of Danish copyright law. Based on the power of expert opinion to legitimize and consequently to rationalize decisions, Teilmann-Lock’s chapter discusses *the incorporation of expertise as a form of expansion*. By the nineteenth century the integration of aesthetics as a criterion of copyrightability already served the purpose of expansive modeling in many other countries and expert opinion consequently strengthened the copyright perspective. Her essay also provides an instructive example of the diverse influences that have permeated legal doctrine over time and demonstrates how law was compelled to incorporate expert knowledge from other disciplines, in this case, the arts. What is original

and what is derivative? That was the central question revolving around all court cases studied in the chapter and it remained a diachronic question in the development of copyright doctrine. In her analysis, Teilmann-Lock pinpoints therefore the historical trajectory that led from utility models to aesthetics and the subsequent replacement of patent through copyright law. Whereas patents qualified purely on the basis of function, copyright was eminently suited to expand and incorporate design as well since it was able to enlarge the radius of protection by integrating additionally the question of form.

The role of patents as instruments of industrial concentration and competition is the focus of Louis Pahlow's chapter on IP and competition policy in late-nineteenth- and early-twentieth-century Germany. Pahlow shifts the emphasis from the historical deliberation on the rights of individual patent holders to the coordinated strategies of domestic and international cartels, which used patent pooling to bundle technical property rights and expand the patents' efficacy in the face of competitors. By means of consolidation within similar fields of technology, companies organized patent associations and assured for themselves the mutual use of their patents. This aggregation of technical and financial means considerably increased the negotiating margins of companies and consequently their competitiveness. In its desire to integrate industries for military purposes during the First World War the German state heavily supported this process; in a similar vein it promoted a flexible and open interpretative framework for patent law and a legislation favoring cartels. The entrepreneurial sector followed suit and took up the initiative after 1918. Louis Pahlow's contribution expounds on the role of *patents as strategic instruments for the protectionist expansion of enterprises*. Through their ability to govern sectors of the economy, patents determined the organizational strategies of businesses. Patent pooling was a way of expanding by "sharing the cake" in a zero-sum game and was eminently used in the framework of economic nationalism. As a consequence, competition between sectors greatly promoted research either through the desire of the cartelized industries to retain their advantage over competitors or through the aspirations of outsiders to overcome precisely this disadvantage. Expansion through research was valued not only for the sake of technical advancement but also, perhaps even predominantly, for its ability to exclude others from the

use of specific technical ideas, in particular regarding the production and sales of goods. Finally, the German state supported strong patent protection as a means of safeguarding medium-sized business and preserving its middle-class carriers.

Lida Barner examines in her chapter the fate of Jewish patent holders' rights in Nazi Germany in the broader context of expropriation strategies imposed upon the Jews in the 1930s and early 1940s. She asks *whether the notion of "Jewish property" was expanded to include IP rights* and concludes that patent law remained comparatively "neutral" toward racial policy and the persecution of the Jews. Under pressure to forcibly sell their patents, administratively obstructed from the payment of patent fees and prohibited from acting as patent agents and consultants, Jewish patent holders experienced various forms of discrimination; their status, however, as right holders with full patent rights remained intact. Some Jewish patent holders were even able to transfer their rights abroad and exploit them for the purposes of economic survival. Barner's essay underscores indirectly one of the main distinguishing characteristics concerning *the expandability of patents and copyrights*; whereas copyrights are tied to the nationality of the copyright holder or a work's initial place of origin and are therefore inherently linked to territoriality, patents can be registered anew in every new country of residence and are therefore particularly advantageous for migrants; this in fact has been the legacy of the patent system ever since its inauguration in fifteenth-century Venice. Barner's chapter highlights an additional aspect intrinsic to autocratic/dictatorial systems and their legal handling of rights. The Nazi objective to incapacitate and ruin Jewish patent holders did not need to center directly on their patent rights; a far more encompassing and operative offensive could be effectuated against them by changing the more generic framework of their personal rights and by eliminating their legal capacity to enter into contract. Their incapacitation therefore was tacit and oblique and targeted their more generic legal status as citizens than their narrow status as patent right holders.

Functionally equivalent observations can be made in connection with the incapacitation of creators in communist regimes. Although communist regimes rarely used the legal framework, that is, copyright law, in order to censor, silence or intimidate authors, they employed more devious and inferred mechanisms of censorship such as bureaucratic and

administrative procedures related to the authorization of manuscripts, like their reviewing by ideological committees or the publishing houses' lectors. The chapters by Debora Halbert and Matthias Wiessner take up on this issue to greater or lesser degrees. The most frequent control mechanism in communism however was self-censorship and the voluntary compliance of authors.

In socialist systems, the absence of "real" markets for patents and copyrights, the administrative regulation of remuneration and the poor availability of modern consumer goods and corresponding technical facilities meant that IP was largely deprived of its original fields of action. Copyright in this context experienced both a contraction and displacement of its scope and effect, based on one hand on the broader economic restructuring and depropertization philosophy of communist regimes in the fields of culture and society, and on the other, on a policy of despecialization. IP regulation in socialism targeted a reframing of the institution based on a new regime. The chapter by Augusta Dimou in this volume emphasizes the necessity to enter into the logic of communist systems in order to understand their political economy of culture and consequently the role of IPRs in them.

The significance of international politics and the authority exercised by geopolitical constellations for the implementation of national IP regimes is the focus of Matthias Wiessner's chapter on IP development in the German Democratic Republic (GDR) and its sister, the Federal Republic of Germany (FRG). His chapter along with those by Augusta Dimou and Jonas Görtz underscore the political dynamic of the postwar period and draw attention to the significance of the Cold War as a formative context. All three essays emphasize the deep political implications of the global legal regimes and the politicization of international agreements such as the Berne Union in the postwar period. Matthias Wiessner highlights the above through an analysis of the competition between the GDR and the FRG, with regard to the GDR's accession to the Berne Union. It was an issue that arose after the defeat and collapse of the Third Reich and concerned the question of whether the German Reich's successor state would continue Germany's commitment to existing treaties. Western reluctance to accept a second German state and the FRG's obstructionist politics as embodied in the "Hallstein Doctrine" blocked East Germany's admission

to international organizations and treaties and determined the GDR's efforts to attain recognition in the Berne Union and by consequence the status of a legitimate state in the eyes of international law. This was eventually achieved but not until 1978 as the GDR acceded to the Rome Act of the Berne Convention. Wiessner's essay also underscores a diachronic trait in the international, global and interstate regulation of IP, namely that states (particularly small ones) often sought or accepted (voluntarily or reluctantly) affiliation to the Berne Union calculating chiefly the benefits and the recognition accrued by being members of an international law treaty; their desire to participate in the international regulation of intellectual goods was of secondary consideration. The Berne Union was a door to international law agreements and politics, just as NATO is nowadays considered the waiting room for EU accession.

Augusta Dimou's contribution examines the political economy of culture and the development of IPRs in communist Yugoslavia, highlighting the embeddedness of copyright within the Yugoslav communist society and economy at large. Dimou discusses *the expansion of copyright in the interaction and interdependence between national and international parameters in the specific conditions and forms that shaped the appropriation, development, reinterpretation and variation of that institution* in the case of communist Yugoslavia. She contends that the evolution of Yugoslav copyright mirrors in some way the geopolitical positionality of Yugoslavia in the Cold War: between East and West but also its position vis-à-vis the rest of the world. Several essays (in particular Dimou, Gracz, Wiessner and Dokmanović) draw attention to the way local contexts and their exigencies influence the reception of international norms and the subsequent configuration between national and international IP regimes. They emphasize the plurality of factors that affect the institutionalization and enculturation of norms such as historical legacies, national and political cultures, social and economic conditions, societal practices, collective interests, social interactions, attitudes, and power relations.

The institutionalization of samizdat as a political act of resistance and as an alternative economy of production and circulation of texts in communism is the focus of Debora Halbert's chapter. She uses samizdat as a case study in order to reflect on authors' creative impetus. Samizdat can be understood as the opposite of conventional copyright regimes with

their emphasis on authors' ownership, control and monopoly rights over the publication, circulation and commercialization of texts. The ideologization, politicization and control of literary production in communism apparently forced authors to create alternative channels of literary circulation, which were effectively based on the elimination of copyright. The rationale therefore to create outside the official (and commercial) system raises some serious questions about authorship, ownership and the possibilities of authenticity. As a consequence Halbert's essay discusses *samizdat as a form of resistance and as the institutionalization of an alternative noncommercial market for knowledge which presupposes and erects barriers to the expansion of copyright, while laying a special claim on authenticity and truth*. Exploring the postsocialist condition and the preponderance of market-driven media systems, Halbert contends that new forms of resistance to the expansion of copyright are currently made possible through the Internet, the role of WikiLeaks, the growing role of user-generated content and e-books as self-published works.

Expansion in the form of legal transplants and institutional transfer are at the focus of the chapters by Michael Birnhack, Adolf Dietz and Mišo Dokmanović. Michael Birnhack's chapter uses the example of a litigation process to establish the rightful copyright owners of Herzl's works that took place in Israel in the 1950s to discuss the enmeshed way in which IP theories are transplanted beyond their birthplace in Europe. The fundamental issue in the litigation was the question of which law ought to be applied to decide the legal status of copyright ownership: British law that had been carried over to the Israeli legal system or German law under which the initial contracts and transactions had been made? Birnhack expounds on the way big legal theories are transplanted and elaborates on the struggle for predominance of legal paradigms. Constituting an additional and informal channel of transfusion, "transplantation by immigration" is related to patterns of migration and takes place when immigrants bring their disputes and by extension their legal systems to their adopted countries. The law applied is often the one in force in the originating country; however, the dilemma surrounding which law ought to be applied may result in the laws of the new country being infused with those of the old. Birnhack demonstrates how stakeholders used the legal systems in order to promote their interests and advocate their agendas.

Finally, his contribution raises the issue of interstate regulation and points at a diachronic conundrum in the interaction between IPRs and international relations.

Given that the socialist legacy of IP protection had been rooted in a different rationale, the postcommunist transformations were bound to be profound. Three chapters by Adolf Dietz, Mišo Dokmanović and Katarzyna Gracz analyze developments after 1989. Adolf Dietz considers the overall transformations of IP regimes in postcommunist Central and Eastern Europe, while Mišo Dokmanović enlarges upon the same topic, focusing on the case study of Macedonia. The rapid economic and political changes of the 1990s brought concomitant modifications in IP law, prompted on the one hand by the need to comply with international and European standards, and on the other, by the enticing prospect of EU accession. Both Dietz and Dokmanović discuss *expansion as the enforcement of international and supranational law in the form of holistic and all-inclusive IP legislation packages* offered to the new member and candidate member states of East and Southeast Europe with the aim of establishing compliance regimes. Conversely, the adoption of new legal frameworks and international standards led to the amendment of existing national laws, in order to making them compatible with the prevailing legal order in each respective country.

In postcommunism, the countries of East and Southeast Europe were faced with the double challenge of transformation and modernization, that is, adapting their old copyright systems to the necessities of a modern market economy and finding answers to the new problems raised by economic, technological and social development. Adolf Dietz's chapter looks specifically at the role EU harmonization directives played on the new IP legislations and explains the interlaced character of rule implementation in the EU context. Comprising of a five-pillar system, the laws adopted by most countries were very modern and consisted of the following components: 1) substantive copyright (objects, owners, content in terms of moral and pecuniary rights, duration and limitation of copyright protection), 2) related or neighboring rights, in part in favor of performers, sound and video producers, 3) copyright contract law (including contract law regarding performances), 4) a comprehensive regulation of collecting societies, and 5) a comprehensive set of rules on enforcement of copyright.

Consequently, harmonization as the adaptation of a comprehensive bundle of rules in the form of harmonization directives and association agreements represents an additional facet of IP expansion strategy.

Mišo Dokmanović exemplifies the above policy “in the making” through his analysis of IP development in the Republic of Macedonia in the post-Yugoslav era. In the 1990s, multilateral and bilateral agreements were the driving forces of change. Bilateral agreements with the US were the forerunner in this new phase of internationalization in IP regulation, and they paid particular attention to practice, which included stipulations on enforcement and dispute settlements.⁸ The Europeans followed at their heels. EC accession is an arduous and gradual process, involving successively more complex accords such as the European Agreements, which required that accession candidates meet the EC’s level of IP protection and accede to specific international conventions within five years. Employing a carrot-and-stick approach, established participants of the international IP regime sought to incorporate the newcomers, rewarding compliance with membership and other amenities. *Being more than a strategy for expansion, the compliance regime also signified the diffusion of specific patterns of action and behavior.*

In order to guarantee that internationalization and internalization of norms go hand-in-hand, large corporations monitor countries around the globe and rate best and worst performances according to their conformity to or deviation from standards of good practice. International ratings and global monitoring generate and make visible hierarchies of “saints and sinners,” which are concomitantly used to spotlight areas requiring vigilance⁹ and ought to help stimulate lower-ranking countries to ameliorate their compliance. However, as Dokmanović observes, the change of established social practices is not solely an issue of volition. Whereas the prospect of EU membership stimulated the improvement of IP legislation and IPR international regulation challenged domestic legislation and established attitudes, in practice these issues proved more difficult to control. Social parameters such as the population’s poor economic status

⁸ Eric J. Schwarz, “Recent Developments in the Copyright Regimes of the Soviet Union and Eastern Europe,” *Journal of the Copyright Society of the USA* 38 (1990–91): 123–226.

⁹ Software Alliance, *The Compliance Gap*, BSA Global Software Survey (June 2014).

and ingrained mentalities largely thwarted the process of IPR's implementation and enforcement.

Local resistance to the international expansion and universalization of IP norms as expressed in the massive anti-ACTA protests of January 2012 in Poland is the focus of Katarzyna Gracz's chapter. She explains the intensity and breadth that the protests acquired in the Polish case as the result of a conflict between the social norms upheld by local end users and the private property paradigm promoted by international IP law through the ACTA treaty. Gracz contends that the diachronic experience of Poles, with externally and internally imposed forms of censorship such as during the tripartite partition of Poland in the late eighteenth century and the communist period later on, has inculcated in the Polish population and intelligentsia a historically specific habitus toward knowledge and culture; namely one that rejected the commodification of intellectual production and more readily associated products of the mind with national identity, free access to culture and resistance. The incentive to create, therefore, in Poland, in much the same way as argued by Debora Halbert for samizdat, was not driven by private ownership and financial gain but by the ability to convey important messages to the public. Consequently, the strong social norms favoring unrestricted access to culture and knowledge should not be perceived as an entirely new phenomenon triggered by the digital revolution, but rather as a social and cultural attitude with historical depth. Gracz concludes that the strong proprietary vision imposed universally by means of recent international trends, which do not take into account local developments, necessarily clashes with social norms that evolved out of particular historical experiences.

One cannot but agree with Gracz regarding the diachronic continuity and the historical depth of such a habitus in Poland. It needs to be mentioned however—partially supporting but also partially relativizing Gracz's argument—that the propensity toward ensuring open access to culture and knowledge does not singularly reflect only the Polish experience but has been more or less a persistent feature of the dissemination and expansion of IP norms in Southeast and East-Central Europe during the nineteenth and twentieth century. Facing a conglomerate of nationalities and ethnicities, the big East European empires of the nineteenth century shunned away from rigorous IP regulation, which threatened

to disturb not only the finances but also the interethnic balance of their multilingual and cosmopolitan realms. In the twentieth century, belated nation-state building, high analphabetism rates, unequal nationalization, anemic capitalism and weak bourgeoisification as well as low social differentiation and many other factors, compelled the states of the region to adopt a protectionist attitude toward the production and dissemination of knowledge and culture, contributing thus to the relativization of the purely commercial dimension of publishing and knowledge, and “investing it—and not just rhetorically—with the character of a public good.”¹⁰ This proclivity was continued unbroken by communism, partially due to ideological reasons, such as the laicist promise of the public ownership of knowledge and the enforcement of a notion of culture as public domain, but partially also for pragmatic reasons; that is, the need of communist elites to follow through with the urgent nationalization and literacy projects of their predecessors. Finally, open access was also buttressed due to systemic reasons, that is, through the economy of shortage in communism; the scarcity of certain intellectual goods propelled a notion and a culture of sharing out of necessity which de facto deterred the development of a strong attachment to private ownership. Deprivation of access as in the case of censorship (and its evasion through samizdat activities) certainly played an important role in the development of this habitus, but as explained above, cannot be credited as the sole explanation for the persistence of these social norms. They have a long history and form part of the legacy of Southeast and East-Central Europe in the nineteenth and twentieth centuries in the broader sense.

¹⁰ See Augusta Dimou, “Blurred Boundaries Resulting from a Weak Market: The Professionalization of Publishing in Interwar Yugoslavia in a Comparative European Perspective,” in *Professionen, Eigentum und Staat. Europäische Entwicklungen im Vergleich, 19. und 20. Jahrhundert*, ed. Dietmar Müller und Hannes Siegrist (Göttingen: Wallstein Verlag, 2014), 291. See also Dimou’s contribution in this volume.

PART I

The Institutionalization of Intellectual Property Rights between National and International Contexts

Intellectual Property Rights and the Dynamics of Propertization, Nationalization, and Globalization in Modern Cultures and Economies

HANNES SIEGRIST

Introduction

Property (in a generic sense) and intellectual property (an encompassing category for copyrights, patents and trademarks) are central elements of the institutional and constitutional order of modern cultures and societies. “Property” refers to a bundle of exclusive rights and entitlements which institutionalize (i.e., regulate) the usage, control and transfer of material and immaterial goods. Property rights define and institutionalize social relations between individuals, groups, organizations, and states in a particular mode, namely as property-based relations. They define and sanction a) the interaction between social actors and b) the relationship between a legal subject and a material or immaterial object. They institutionalize the cooperation, communication and competition among social actors such as entrepreneurs and workers, owners and nonowners, producers, mediators and users. They determine the allocation and usage of goods or assets such as land, buildings, technical equipment, financial capital, forms of expression and useful new technical knowledge.¹ Thus,

¹ For an introduction with extensive bibliographic references, see Hannes Siegrist and David Sugarman, “Geschichte als historisch-vergleichende Eigentumswissenschaft. Rechts-, kultur- und gesellschaftsgeschichtliche Perspektiven,” in *Eigentum im internationalen Vergleich*, ed. H. Siegrist and D. Sugarman (Göttingen: Vandenhoeck und Ruprecht, 1999), 9–30; Hannes Siegrist, “Die Propertisierung von Gesellschaft und Kultur. Konstruktion und Institutionalisierung des Eigentums in der Moderne,” *Comparativ* 16, no. 5/6 (2006): 9–52 (special issue: *Entgrenzung des Eigentums in modernen Gesellschaften und Rechtskulturen*, ed. H. Siegrist); Chris M. Hann, “Introduction: The Embeddedness of Property,” in *Property Relations: Renewing the Anthropological Tradition*, ed. Chris M. Hann (Cambridge: Cambridge University Press, 1998), 1–47; Franz von Benda-Beckmann, Keebet von Benda-Beckmann, and Melanie Wiber, “The Properties of Property,” in *Changing Properties of Property*, ed. F. von Benda-Beckmann,

material and immaterial property rights belong to the broader category of exclusive long-term rights, which are expected to stabilize social relations and hierarchies, to integrate societies and to regulate exchanges. The histories of material and immaterial property rights differ in some respects but are fundamentally connected and complementary. In the following chapter I will focus on the history of propertization (as well as de- and repropertization) in the spheres of information, cultural artifacts, symbols, forms of expression, and scientific and technical knowledge in the contexts of nationalization and globalization of cultural and economic relations.

Propertization means that relationships between persons, organizations and objects are increasingly conceived and regulated as property-based relations. Because the meanings, functions and effects of intellectual property rights depend on the general social, cultural and institutional setting in which they are embedded, I will outline the history of intellectual property rights within the general history of culture, science, economy and politics. I will do this specifically by connecting the history of propertization with the histories of the nationalization and globalization of cultural relations. These three forms and strategies of institutionalization and organization are fundamental to an understanding of the dynamics of modern societies, economies and cultures. I will examine how these strategies have been combined at different times and in different places; and whether they hindered or consolidated one another. This will help us to explain, and subsequently understand, the history of the expansion of intellectual property rights.

K. von Benda-Beckmann, and M. Wiber (New York: Berghahn, 2006), 1–39; Dietmar Müller and Hannes Siegrist, eds., *Property in East Central Europe: Notions, Institutions and Practices of Landownership in the Twentieth Century* (New York: Berghahn, 2015).

Intellectual Property Rights and the Privatization, Nationalization, and Globalization of the Economy and Culture from the Eighteenth to the Twenty-First Century: Concepts and Narratives²

Concepts: Intellectual property is a particular institution which represents a specific mode of ownership, access or control. *Legally* intellectual property rights can be understood in the broadest sense as a set of individual and exclusive rights to intellectual work or intangible assets. In this sense intellectual property is a generic term which covers copyright, patents, trademark law, and related ancillary rights. While patents define how to deal with technical inventions, copyright governs how cultural assets are treated, as well as the relationship between authors, rights' exploiters, users and the public sphere.

Such exclusive rights not only justify the legal claims to power, exploitation and usage of the rights holder, but they also determine social, cultural, public and economic relationships. Intellectual property is interesting not only from a legal perspective (as a *legal entity* or *legal norm*), but also from a cultural, social and economic viewpoint, namely a) as a *cultural pattern*, that is a set of attitudes, values, and forms of praxis; b) as a *social institution*, which governs how social stakeholders and societies deal with symbolic forms and cultural artifacts; and c) as an *economic institution*, which helps to regulate the costs for transactions in cultural commodities and so-called public goods, which can be used by several stakeholders at the same time.

The concept of intellectual property was developed in the eighteenth and nineteenth centuries by the leading cultural and industrial states of the West to regulate specific aspects of social and economic dealings with printed works and new technical procedures. Over the last two hundred years the concept has been appreciably refined and has extended into more and more cultural and industrial sectors and various areas of society. This

²This chapter and those that follow are revised versions of the following articles by the author: H. Siegrist, "Die Regulierung kultureller Beziehungen im Zeitalter des geistigen Eigentums," *Zeitschrift für Geistiges Eigentum/Intellectual Property Journal* 6, no. 2 (2014): 1–33; H. Siegrist, "Historical Perspectives on the Globalization of Intellectual Property," in *Who Owns the World's Knowledge?*, ed. C. M. Flick (London: Acorn Independent Press, 2012), 187–237; H. Siegrist and I. Löhr, "Introduction," *Comparativ* 21, no. 2 (2011): 7–28 (special issue: *Intellectual Property Rights and Globalization*, ed. I. Löhr and H. Siegrist).

increasing tendency to conceive of and to regulate relationships in culture, science and economics as relationships based on property or similar to property can be understood historically and systematically as a process of propertization. In general, propertization means that exclusive claims to the exploitation, control and use of tangible and intangible assets are regulated and established by means of theories, concepts and norms concerning property.³

In the special case of cultural and knowledge assets, propertization refers to social, cultural, and legal programs, strategies and processes which amount to the regulation of society's dealings with forms of expression and knowledge (particularly commercially exploitable intellectual works) that emanate from the principle of intellectual property. Cultural, scientific, and economic relationships are understood in a heightened moral and legal way in terms of property or as being similar to property relationships. The spatial and temporal validity of proprietary rights and laws is extended. Professional and status groups, interest groups, nation-states, international organizations and supranational associations tend to broaden the functional and validatory range of intellectual property in functional terms and in time and space. In so doing the validity and role of alternative models of regulating the production, distribution and use of knowledge (such as donation, friendship, neighborliness, professional solidarity, bureaucratic rule, national identity, public ownership, etc.) become relativized.

In the following article I will show how programs, strategies and processes of propertization (and sometimes depropertization) are interwoven with processes of nationalization and globalization of culture. By nationalization I mean that social, cultural, economic, legal, and political relationships are primarily regulated from the point of view of the formation of a national society and community, with reference to principles such as national political and legal sovereignty, economic independence and a distinctive cultural identity. Globalization refers to political, economic,

³ See Siegrist, "Die Propertisierung von Gesellschaft und Kultur," 9–52. On the problem of propertization in agriculture and in rural societies, cf. Chris Hann's ethnological studies "Propertization und ihre Gegenteilstendenzen. Beispiele aus ländlichen Gebieten Europas," *Comparativ* 16, no. 5/6 (2006): 84–98; F. von Benda-Beckmann, "Propertization in Indonesien. Parallele und gegenläufige Entwicklungen," *ibid.*, 99–111.

social, cultural and legal strategies of cooperation, exchange, integration or hegemony that transcend the borders of national states and lead to a delimitation of an institutional and cultural order. Addressing the approach of multilevel governance I will analyze regulatory strategies in which state, private and international stakeholders and organizations are involved.⁴

Narratives: From a historical point of view modern copyright and patent laws are moral, institutional, and legal innovations of the late eighteenth and early nineteenth centuries. The concept of intellectual property law spread across western and central Europe as well as to America during the great institutional and social revolutions and reforms that occurred between 1770 and 1870.⁵ Within the framework of freedom of trade, industrialization and the rise of modern capitalism, extended political participation, freedom of speech or culture and what became known as public sphere copyright and patent laws served to protect specific claims to use and exploitation of knowledge as well as forms of expression.

At that time the institutionalization of cultural and scientific relationships in terms of property relationships acquired specific meaning and function during the modernization of the territorial state and the nationalization of society, culture, economy and law. (Here “nationalization” is used as shorthand for processes of integration and homogenization which at the time were taking place not only in nation-states such as France and Great Britain but also in the numerous regional states that

⁴ Siegrist and Löhr, “Introduction,” 7–28; Siegrist, “Die Regulierung kultureller Beziehungen im Zeitalter des geistigen Eigentums,” 1–33.

⁵ See, e.g., Brad Sherman and Lionel Bently, *The Making of Modern Intellectual Property Law: The British Experience, 1760–1911* (Cambridge: Cambridge University Press, 1999); Ronan Deazley, *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth-Century Britain, 1695–1775* (Oxford: Hart Publishing, 2004); Elmar Wadle, *Geistiges Eigentum. Bausteine zur Rechtsgeschichte*, vol. 1 (Weinheim: VCH Verlagsgesellschaft, 1996), vol. 2 (Munich: Beck, 2003); Martin Vogel, “Die Entwicklung des Urheberrechts,” in *Geschichte des deutschen Buchhandels im 19. und 20. Jahrhundert*, vol. 1: *Das Kaiserreich 1870–1918*, ed. Georg Jäger et al. (Frankfurt a. M.: Buchhändler Vereinigung, 2001), 122–69. Cf. also the digitized sourcebook with commentary on Great Britain, France, Germany, and the USA: Lionel Bently and Martin Kretschmer, eds., *Primary Sources on Copyright (1450–1900)*, www.copyright-history.org; Margrit Seckelmann, *Industrialisierung, Internationalisierung und Patentrecht im Deutschen Reich, 1871–1914* (Frankfurt a. M.: Klostermann, 2006); Alain Beltran, Sophie Chauveau and Gabriel Galvez-Behar, *Des Brevets et des marques. Une histoire de la propriété industrielle* (Paris: Fayard, 2001).

preceded Germany and Italy and in the empires of the time.) Intellectual property rights within nation-states were intended to stabilize cooperative and competitive relationships between particular professional and interest groups. Thus, propertization and nationalization of cultural and economic relations were in many ways complementary processes. State and social elites used the concept and norms of intellectual property to coordinate their particular professional, social, cultural, and economic interests and then adapted them to their overarching goal of establishing an efficient national culture, national science and national economy. In the nineteenth century and well into the twentieth it was predominantly property-owning and educated circles who took an interest in the protection of intellectual property, for example, employers in industry, media and culture; all kinds of authors; freelance artists; inventors; engineers and architects; small groups of lawyers specializing in copyright, patents, and trademarks as well as among informed lay groups.⁶

The modern state governed by the rule of law and based on culture assigned individual exclusive rights to authors and publishers, inventors and industrial entrepreneurs for intellectual works and inventions. By doing this, liberal states pretended to guarantee the “natural rights” of citizens. Autocratic and authoritarian regimes used copyrights and patents as a form of delegated power which was conferred upon protagonists who subsequently undertook tasks, which the state could not or did not want to undertake or completely control. Gradually the claims of authors and inventors to a natural right to their works—claims which were initially grounded in pragmatic, moral, or philosophical ideals—were addressed and were defined and underpinned by constitutional requirements, court rulings, standardized forms of private contracts, legal commentaries and specific legal theories. As a result institutional and legal knowledge about intellectual property also became one of the foundations of lawyers’ specialist professional requirements. Between the late eighteenth and the late nineteenth centuries more and more states became convinced that

⁶ See, for example, Martha Woodmansee, “The Cultural Work of Copyright: Legislating Authorship in Britain, 1837–1842,” in *Law in the Domains of Culture*, ed. Austin Sarat and Thomas R. Kearns (Ann Arbor: University of Michigan Press, 1998), 65–96; David Philip Miller, “‘Puffing Jamie’: The Commercial and Ideological Importance of Being a ‘Philosopher’ in the Case of the Reputation of James Watt (1736–1819),” *History of Science* 38, no. 1 (2000): 1–24.

intellectual property law could regulate problems which traditional legal instruments and institutions such as publishing privileges, commercial monopolies and exclusive rights of guilds had failed to resolve.

Unlike material property rights, which were evolving during the same historical period, intellectual property rights had limited time spans. In addition, the legal status and the jurisprudential argument for these new, exclusive rights in cultural, technical, and scientific areas remained contested for a long time. While material property rights were a central element of the systematic and theoretically coherent civil, criminal or public law codes from the very beginning of modern legislation and codification, intellectual property rights, applying to the use of so-called immaterial assets or intangible goods, were devised within the framework of everyday practice and pragmatically written by courts, legal practitioners, lobbyists and interested legislators. It was only later that specifically defined coherent legal fields and specialties—such as copyright law and patent law—emerged and such rights were finally integrated into constitutional law as a subcategory of property rights. Depending on the region, time period, subject area and legal culture, these intellectual property rights were variously recognized and standardized as laws pertaining to property, copyright, authors and inventors, competition, investment protection, or monopoly. In some areas of central and eastern central Europe they were, in part, still considered to be privileges until the late nineteenth century. Certainly during the nineteenth century the protection of intellectual property rights was the priority, i.e., the exclusive, individual right to the reproduction and commercial exploitation of an “intellectual work.” Only in the twentieth century was the property-rights aspect of intellectual property law in Europe expanded and underpinned by the author’s and inventor’s moral rights based on the law of personality rights.⁷

For a long time, intellectual property law regulated only a few select functions and uses. Literary and artistic property law standardized

⁷ Cf. on the debate, which has flared up again since the 19th century, particularly in mainland Europe, about whether intellectual property protection should be based on laws of property rights or personality rights: Louis Pahlow, “Geistiges Eigentum,” in *Enzyklopädie der Neuzeit* (Stuttgart: J. B. Metzler, 2006), vol. 4, 291–96; Louis Pahlow, “Intellectual Property, Propriété Intellectuelle und kein geistiges Eigentum? Historisch-kritische Anmerkungen zu einem umstrittenen Rechtsbegriff,” *UFITA* 115 (2006): 705–26.

functions and relationships in the printing and book industries and in elite culture. The law of patents became increasingly important in those fields of industry and science which were technically innovative and economically dynamic, such as the chemical, mechanical and electrical industries.

Legislators placed limits on individual intellectual property rights in the interests of the public sphere and the state. First, it was considered in the public interest to limit the duration of intellectual property rights. Second, limiting provisions in copyright and patent law were introduced as relativizing factors. Third, the legislation was embedded in cultural, educational, economic, and social policies. Thus at a national level the history of intellectual property was determined from the outset by the search for an acceptable balance between private and general interest.

In the course of the nineteenth century, when international exchanges in the cultural, media, and knowledge industries were intensifying, the question of balancing interests in cross-border relationships became more pressing. The following problems had to be addressed: what to do when protected cultural assets were published, processed, translated, and commercially exploited beyond their own territory of origin, and production processes protected by patent law were used freely abroad. Even in countries which already had modern patent laws in place, the “first notifier” could receive a patent for a foreign invention which was not their own. This meant that where intellectual property rights could not be protected explicitly from unauthorized cross-border use through a *private contract* between the original author, originating publisher, or patent owner, and the foreign user or exploiter, any claims consequently evaporated beyond national borders. Those affected by this counterfeiting and reprinting called it piracy, but could do very little about it, as the regulatory powers and powers of sanction by the sovereign state stopped at the border of their own country. States and governments which declared intellectual property to be sacrosanct in their own territory adopted an ambivalent position with regard to the claim rights of foreign citizens and businesses. In the competition for political power, cultural influence, economic prosperity and military strength, exclusivity claims based on foreign law were inevitably settled to the advantage of the domestic nation. So it became evident that liberal propertization strategies at a national level were not sufficient. The stated view of the upwardly mobile classes

and liberal property-owning society that tangible as well as intangible property rights were a question of universal, exclusive rights based on individual work, achievement and investment, threatened to become no more than fantasy. Therefore authors, inventors and entrepreneurs urged legislators and administrators at regional and national level to intensify the search for solutions to the problem that texts, images and music as well as new and useful technical knowledge could be reproduced and used in many different locations simultaneously without protection for the originator of the work or the inventor.

As the cross-border exchange of cultural and knowledge-based assets increased and as trade and customs barriers were removed owing to the introduction of free-trade policies, states focused increasingly on the institutions of intellectual property. Copyright, patents, and trademarks, accompanied by a whole raft of derivative, related ancillary rights, were to provide the basis for regulating and sanctioning the competition and cooperation between individuals and organizations even on an international level. Intellectual property rights and corresponding strategies of propertization became instruments of foreign policy relating to trade, industry and culture. A few western and central European countries which were both cultural exporters and industrial states determined the standards which were consequently adopted, either voluntarily or under pressure, by other states.

Entrepreneurs, authors, inventors and lawyers put increasing pressure on legislators and state administrations to formulate internationally binding rules that would address cultural assets and technical inventions. The aim was to draw up international agreements that would protect private and national interests and which would strengthen legal security and predictability in cross-border relationships; both cultural and economic. In Europe intergovernmental negotiations regarding standards in bilateral contracts and in property and commercial law initially intensified in the wake of liberalizing and free-trade policies introduced around 1840 and in the years following 1860. Large and medium-sized “cultural and industrial states” protected the intellectual property rights of their entrepreneurs, inventors and authors primarily through a network of bilateral trade agreements, which often confirmed both material and immaterial property rights.

After the failure of plans for the creation of a uniform international standard of protection, European industrial and cultural exporting states such as France, Germany, Great Britain, Switzerland, and Belgium subsequently came to an understanding on the protection of literary and artistic works as well as technical inventions, through multilateral agreements, as was common in other fields in late nineteenth century.⁸ The moral, legal, institutional and organizational foundations for the international protection of intellectual property rights were established in the 1880s: the Paris Convention of 1883 regulated international patent protection⁹ while the Berne Convention of 1886 regulated the international protection of literary and artistic property.¹⁰ The international regime of intellectual property was founded thereafter on the principles of mutual recognition of national copyright (reciprocity), the equality of the foreign and domestic parties in the patent and copyright law of each nation (national treatment) and the harmonization of laws. In the case of technical inventions the criteria by which states awarded their patents were universalized, but individual patents also had to be acquired for each country concerned. These international conventions protected the globalization of the culture, media, and knowledge industries during the twentieth century and ensured the worldwide dissemination of Western standards in cultural, scientific and economic relations.

However, the implementation of these international standards was not seamless or without problems, either in Europe or at a worldwide

⁸ For a general discussion on the question of the international conventions and organizations, see: Madeleine Herren, "Governmental Internationalism and the Beginning of a New World Order in the Late Nineteenth Century," in *The Mechanics of Internationalism: Culture, Society, and Politics from the 1840s to the First World War*, ed. M. H. Geyer and J. Paulmann (Oxford: Oxford University Press, 2001), 121–44. On intellectual property in particular, see Isabella Löhr, *Die Globalisierung geistiger Eigentumsrechte. Neue Strukturen internationaler Zusammenarbeit 1886–1952* (Göttingen: Vandenhoeck & Ruprecht, 2010); Miloš Vec, "Weltverträge für Weltliteratur. Das Geistige Eigentum im System der rechtsetzenden Konventionen des 19. Jahrhunderts," in *Grundlagen und Grundfragen des Geistigen Eigentums*, ed. L. Pahlow and J. Eisfeld (Tübingen: Mohr Siebeck, 2008), 107–30.

⁹ Margrit Seckelmann, "From the Paris Convention to the TRIPS Agreement: The History of the International Patent Agreement as a History of Propertisation," *Comparativ* 21, no. 2 (2011): 46–63; Christian Mersch, "Die Welt der Patente. Eine soziologische Analyse des Weltpatent-systems," in *Weltgesellschaft*, ed. Bettina Heintz, Richard Münch and Hartmann Tyrell (Stuttgart: Lucius & Lucius, 2005), 239–59.

¹⁰ Löhr, "The Propertisation and Internationalisation of Culture," 29–45.

level. European imperial powers such as Great Britain and France also implemented the legal system of the mother country in addition to the international conventions in their colonies, while still maintaining a certain preferential treatment for the authors, inventors and businesses of the imperial motherland. Even on the continent of Europe the convergence and harmonization of intellectual property rights was massively and repeatedly restricted up until World War I as a result of diverging interests and differing legal traditions and institutional preferences. Industrial countries such as Germany, Switzerland, and the Netherlands resisted completely recognizing the international Patent Convention until 1900. “Multiethnic” imperial nation-states such as the Austro-Hungarian Empire and Tsarist Russia distanced themselves from the Berne Union for the protection of literary and artistic property, as their publishers complained that translation costs and royalties for foreign authors bore no relation to expected returns in light of the limited market in less widely spoken languages. Their bilateral agreements with the major culture-exporting states proceeded only haltingly. And most of the states of North and South America did not take part in the Berne Union, preferring to draw up a raft of multilateral agreements under the umbrella of the Pan-American Copyright Convention, to which they denied access to non-American states.

A further impetus toward liberal propertization policies came about after World War I, when the eastern and central European nation-states which had emerged from the Hapsburg Empire acceded to the Berne Union in the context of the peace treaties. In the 1920s a new protagonist entered the scene with the creation of the League of Nations, which systematically integrated propertization and globalization strategies into culture, science and the economy, and energetically promoted them.¹¹ At the same time international cartels used patents and patent pools as instruments of monopolistic strategies and commercial expansion.¹²

New and hybrid patterns of intellectual property rights and communist or state-socialist types of propertization and depropertization emerged in 1917 in Russia and again in the late 1940s in Eastern Europe. Communist

¹¹ Löhrr, *Die Globalisierung geistiger Eigentumsrechte*.

¹² See Louis Pahlow, “Intellectual Property and Competition Policy: Patent Pooling and Industrial Concentration in Germany (1890–1930),” in the present volume.

strategies of propertization and depropertization prioritized the property claims of the state and adapted the concept of national commons by redefining it as the cultural heritage of the people and the cultural property of the socialist nation. Traditional claims and individual exclusive rights of authors and inventors were restricted, recodified and recontextualized. The rights and duties of authors and inventors were primarily regulated by collective labor contracts and detailed lists were drawn up for the remuneration of different types of intellectual works and different categories of authors, inventors, professionals, and performing artists. Copyright served a supervisory and repressive function and was used to promote state interests within the process of cultural and scientific progress in both internal and international relations.¹³

After a phase of stagnation and massive setbacks during the Great Depression and above all during World War II, the propertization projects of the interwar years were taken up once again after 1945 by UNESCO, the Berne Union, the Paris Convention, and leading Western industrial countries, which implemented many such projects between 1950 and 1970. Since the 1960s more and more socialist countries and even developing countries have participated in the international agreements for the protection of intellectual property. Many of them started by joining the Universal Copyright Convention (founded in 1952), which had rather moderate standards of protection (by comparison with the Berne Convention).¹⁴

¹³ See in the present volume: Matthias Wiessner, "Copyright in the German Democratic Republic and the International Copyright Regime"; Augusta Dimou, "From State Governance to Self-Management: Intellectual Property Rights in Communist Yugoslavia"; Debora Halbert, "Samizdat, Copyright, and the State: Copyright as Censorship and the Differences between East and West." Furthermore: Dorothea Trebesius, "Künstlertum, Autorschaft und Professionalisierung. Komponisten in Frankreich und der DDR," in *Professionen, Eigentum und Staat. Europäische Entwicklungen im Vergleich (19. und 20. Jahrhundert)*, ed. D. Müller and H. Siegrist (Göttingen: Wallstein, 2014), 253–71; H. Siegrist and C. Daase, "Patentrecht im spät- und postkommunistischen Ostmittel- und Osteuropa. Nationale, regionale und globale Transformationsprozesse des Schutzes geistigen Eigentums von den 1970er Jahren bis heute," *Zeitschrift für Ostmitteleuropa-Forschung* 61, no. 3 (2012): 378–403.

¹⁴ See Jonas Görtz, "Power and Development: The Revision Conferences of 1967 and 1971 of the Berne Convention and the Universal Copyright Convention," in the present volume, and I. Löhr, "Wem gehört die Kultur? Die UNESCO zwischen geistigem Eigentum, Folklore und kulturellem Erbe in den 1960er und 1970er Jahren," in *Global Commons. Anspruch und Legitimation der "Gemeingüter" als Erbe der Menschheit nach dem Zweiten Weltkrieg*, ed. I. Löhr and A. Rehling (Jahrbuch des Instituts für Europäische Geschichte Mainz, vol. 15) (München: Oldenbourg, 2014), 135–62.

In 1967 the World Intellectual Property Organization (WIPO) took over as the new umbrella organization, consolidating a regime of intellectual property laws which had a global scope. Since the 1980s expectations in intellectual property rights have once again been raised quite considerably. This is due, among other things, to the increasing liberalization of scientific and economic relationships and the digitization and expansion of the culture, media, and information industries. Patents, copyright, trademark law, and related ancillary copyrights are considered, in the context of the liberalization of international trade relations, as central legal and moral institutions of the world economy. They are diffused worldwide and harmonized in order to guarantee predictability in international relations. Since 1994 the World Trade Organization has, with the help of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), been increasing the pressure on state and nonstate parties, who wish to reject or restrict international standards by claiming such standards are unfair.¹⁵

Today 184 states belong to WIPO and over 150 to the WTO; therefore, the legal standards represented by the international umbrella organizations are recognized throughout the world. In spite of this, these standards remain controversial for many reasons. Critics from peripheral states accuse patent law of protecting the special interests of rich states and multinational corporations in the knowledge industry, rather than the general human right to health and prosperity. Critics at the center of the globalized world complain that copyright no longer serves workers in the cultural sector, the public, or the culture of a nation, but rather globally operating media concerns. Negotiations concerning the harmonization of national copyright, patent, and trademark laws to conform with WTO guidelines and European Union directives show that even in those large European states where intellectual property rights are traditionally well established doubts are being expressed about uniform international laws. Conflicts on this topic manifest themselves not only in public protests of civil antiproprietization movements but also in national parliaments'

¹⁵ See, e.g., Peter Drahos with John Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* (London: Earthscan, 2002); Christopher May, *The Global Political Economy of Intellectual Property Rights: The New Enclosures?* (London: Routledge, 2002).

processes of adaptation and implementation by courts and public authorities.¹⁶ The search for new forms of understanding and communication are thus once again the key to a renewed public debate concerning material and immaterial property rights.

Ten Theses about the Dynamics of Propertization in the Age of the Nation-State and Globalization

The following ten theses revisit central aspects and discuss selected problems of the long-term and worldwide processes of propertization (as well as de- and repropertization) in the age of the nationalization and globalization of cultural, scientific, and economic relations.

1. The concept of intellectual property was originally developed in the context of the nationalization and liberalization of society, culture, and the economy. We are still reminded of these roots today by the cyclical revival of standard theories, master narratives and myths about the affinity of liberal values and individual property rights and about the balance between private and public rights.

The concept of intellectual property emerges from the formative periods of modern culture, science and economics. It was developed in the eighteenth and nineteenth centuries in American and European culture-producing states with the objective of protecting the individual creative and commercial work of certain groups of the affluent and educated middle classes and protecting their special entitlements and special position during the transition from traditional aristocratic and profession-based society to modern class society. From the start, the modern nation-state controlled the effects of its politics of propertization by coordinating the scope and reach of individual intellectual property laws with its goals in

¹⁶ See in the present volume: Katarzyna Gracz, "Opposing the Expansion of Copyright Laws: Social Norms in the Quest against ACTA and the 'Commodification of Knowledge and Culture Project'"; Adolf Dietz, "The Influence of EU Copyright Harmonization Directives on the Building of Post-Socialist Copyright Law in Central and Eastern Europe"; Mišo Dokmanović, "A New Concept in an Old Context: The Legal Framework of the Transformation of Intellectual Property in Macedonia after the Dissolution of Yugoslavia."

cultural, educational, legal, economic, and social policy. By placing a time restriction on intellectual property laws the nation-state defined a moving wall between knowledge and culture that is *subject to exclusive rights* and that which is *in the public domain*. Intellectual property rights were embedded into the then new and most influential regimes of temporalization and territorialization of culture and knowledge (old and familiar versus new, original and individual cultural or scientific knowledge; own culture versus the other's culture).

The meanings, functions, and effects of property rights depended on the general social, cultural, and institutional setting in which they were embedded. Liberal societies, where individualistic concepts of property were getting stronger, promised that the concept of absolute private property rights formed the basis of individual freedom, achievement, and meritocracy, social integration, sense of responsibility, economic wealth, political stability, and cultural progress. They nevertheless had to respect alternative institutional patterns which manifested themselves in communitarian and collectivist concepts of property and bring nationalistic and state-oriented goals into balance with private interests. Since that time, all subsequent debates about intellectual property have used and adapted rules, concepts and discourses which stem from the formative period of modern culture, society and intellectual property law in Europe and the United States of America.

2. By means of intellectual property laws the legislator and state protect not only individual, but also national interests. States and national interest groups propagate the propertization of culture and knowledge within and beyond their own territories in order to increase influence and consolidate power. This leads to tensions and conflicts between strong and hegemonic states which export their cultural commodities and institutions on the one hand and weak states which depend on cultural imports and are not adequately prepared to respond to institutional challenges.

States and national interest groups use the instruments of intellectual property in order to protect, during cross-border activities of exchange and commercial exploitation, the forms of expression and science

originating in their region. In this way the state protects its national interests against third-party states and foreign users. Industrial and culture-exporting countries with a higher protection level for intellectual works and inventions urge states with a lower protection level to adopt their rules. In a dynamic culture and in a capitalist and competitive economy authors and inventors, as well as businesses involved in the cultural and science industries, and whole states, must adapt in order to fulfill their cultural, economic, or political potential. When the usual tactics of exerting pressure are no longer effective, however, they may be forced to modify their more extreme demands—e.g., by accepting compulsory licenses. The parties concerned may attempt to convince potential customers, cooperation partners, as well as countries that are not (yet) incorporated into the system of proprietary relations, of the moral, economic and legal advantages of their intellectual property law. In this they often refer to their own history of progress and success. They present intellectual property law as a universal recipe for the institutionalization of knowledge and culture.

Economically weaker and culturally dependent states become involved when they believe their participation in processes of cooperation, regulated according to the property model, will strengthen their opportunities for action and of becoming suppliers and rights holders themselves. If the expected effects fail to materialize and the chances of equal participation appear negligible, the acceptance of intellectual property laws by the weaker party is, as a rule, minimal. If a vicious circle of depropriety starts in the peripheries of the globalized system of international and intercultural relations, it cannot easily be stopped or reverted by the dominant parties at the center. This leads to anomic conditions as well as conflict, both open and hidden; arrogance on one side, mimicry and evasion on the other.

For long periods of history the international conventions on intellectual property have represented the interests, ideas and institutional preferences of culturally, scientifically, and economically dominant societies. Because of inequalities in the power balance of international relations, weaker stakeholders can only realize the formal rights accorded to them by the international conventions in a very limited way. Thus they frequently regard the discourse, institutions and norms of intellectual property laws as being part of power and subjugation strategies.

By contrast the stronger countries regard the international organizations which protect intellectual property rather as cultural, scientific, or economic cartels by which they can extend their power. Since the international conventions on the protection of intellectual property concentrate on the resolution of special problems and the dissemination of proprietary laws their rules make little attempt to conform to local conditions. Sometimes the expectations of neither the larger nor the small member countries are met.

3. In the twentieth century propertization in the liberal sense remained a global power strategy of the leading Western nations. Emerging countries later adopted propertization as well, as a strategy for emancipation and participation.

In the nineteenth and twentieth centuries European states and the USA imposed the institutions of intellectual property, which they had originally developed for their own culture, science and economy, around the globe, declaring them, in spite of a wide range of reservations and objections, to be the universal standard. In this way they underpinned the commercial and exploitative interests of their national cultural and scientific industries and protected their economic power, their cultural influence and their hegemony in many parts of the world. They used this power and influence to disseminate their commodities, values, notions of creativity and innovation, cultural canons, as well as their scientific and technical standards. Over the course of history the behavior of a wide range of stakeholders has been subjected to moralization, judgment, and homogenization as a result of a central concept, which was created by the West and which derived from their social conventions, cultural preferences and legal norms.

Until quite recently the members of Western property cultures had treated the traditional knowledge and forms of expression of non-Western or indigenous cultures as assets in the public domain, as these assets, the West maintained, were not based on individual creative work. Insofar as possibilities of commercial exploitation were available, the intellectual property rights to these indigenous works and cultural items were claimed by foreign businesses and protected by Western intellectual property

rights. The question of whether symbolic goods and forms of knowledge can be considered to be property and are thus protectable as such has traditionally been decided on the basis of the relationships of power and domination in cultural and intercultural relationships.

This situation has currently reached a certain turning point, as the representatives of so-called indigenous or folk cultures have learned how the ideas of subjective creativity and individual intellectual property can be used for their own purposes.¹⁷ Current dealings with what are referred to as indigenous forms of expression, traditional knowledge, natural resources and genes in the peripheral states of India, the Americas, Russia, and Africa are regulated more rigorously than ever before according to the property model. It is no longer just globally active Western rights holders, business, and states who are involved, but also businesses, governments, elites, interest groups, and local communities from emerging and developing countries. For several decades stakeholders in the states of the world formerly considered to be “peripheral” have been calling attention more and more to intellectual property when negotiating their moral and legal claims. The “international language of intellectual property” is also sometimes used by the representatives of old or revived tribal communities, ethnic groups and village communities in order to protect and commercially exploit their particular knowledge and designs. In this process, however, conflicts over exclusive and inclusive rights of disposal and use are simply brought to global attention in a new way.

4. The history of the twentieth century is characterized by tensions between the homogenization, differentiation, and hybridization of intellectual property law at the local and global level.

¹⁷ Cf. on this and the following: Rosemarie J. Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law* (Durham: Duke University Press, 1998); Michael Brown, “Can Culture Be Copyrighted?,” *Current Anthropology* 39, no. 2 (1998): 193–223; Michael F. Brown, *Who Owns Native Culture?* (Cambridge, MA: Harvard University Press, 2003); Christoph Beat Graber, “Wanjina and Wunggurr: The Propertisation of Aboriginal Rock Art under Australian Law,” in *Soziologische Jurisprudenz. Festschrift für Gunther Teubner zum 65. Geburtstag*, ed. Gralf-Peter Calliess et al. (Berlin: Walter de Gruyter, 2009): 275–97; Sabil Francis, “The Propertisation of Knowledge: Leaving the Owner Out,” *Comparativ* 21, no. 2 (2011), 64–79.

In principle the globalization of intellectual property laws can both promote and obstruct the transfer of commodities, knowledge, and forms of expression. Such globalization determines to a certain degree the scale of international exchange and integration. It not only underpins harmonization and homogenization, but also leads to ever more new types of differentiation and local hybrid forms of intellectual property laws and customs. Since the nineteenth century lawyers, politicians, authors, employers, and officials in the international specialized agencies have been working on a comparative analysis and on the harmonization of the situation. National and international standards of hegemony are brought into line with particular relationships and needs on the basis of national and local traditions, mentalities and interests specific to legal culture. In this way intellectual property law becomes more ambiguous and more multifunctional.

The main legal models for international propertization are the Anglo-Saxon concepts of *copyright* and *intellectual property rights*, as well as the Continental European concepts of literary and artistic property, author's right [*Urheberrecht*], moral rights, immaterial rights and copyright contract law.¹⁸ The development of patent law principally follows French, English, German, and US standards. Together with international conventions these basic patterns characterize the fundamental history of the global reach of intellectual property laws. Based on intensive transfer of ideas, norms and forms of praxis they have become harmonized, to a great extent, over time. Comparative research on copyright and patents in Europe and the USA shows that they each retain certain legal idiosyncrasies but fulfill similar social, cultural, economic and political functions.¹⁹

Even in the twentieth century the classical pioneering states in intellectual property were inclined to underestimate the problems involved in transferring their laws into new contexts and to overestimate the usefulness of their own norms and procedures in other institutional settings or

¹⁸ See Michael Birnhack, "The Melting Pot of Copyright Law: *Urheberrecht* in Jerusalem," in the present volume.

¹⁹ The convergence in functional terms is stressed by Michael Goldhammer, "Die Begründung des geistigen Eigentums in der US-amerikanischen Rechtswissenschaft und ihre Bedeutung für die deutsche Diskussion," *ZGE* 1 (2009): 139–66. The legal differences between US copyright and author's rights in Europe are stressed by Peter Baldwin in *The Copyright Wars: Three Centuries of Transatlantic Battle* (Princeton: Princeton University Press, 2014).

legal cultures. Thus in those countries on the periphery of globalization Western property law often proves to be less robust than in its original regions.²⁰

Hegemonic states and international organizations repeatedly lose short-term effective control over the propertization process which is spreading further and further afield. Both in the central and peripheral nations hybrid legal patterns and forms of legal pluralism are developing in which traditional and new, domestic and foreign norms coexist. Increasingly the boundaries between copyright, patent, trademark law and the related ancillary copyrights of record companies and media groups have become blurred, as these laws can be used both alternatively and cumulatively.²¹ Occasionally, criticism of intellectual property becomes radicalized in the context of general denunciations of power, culture, society, capitalism, or globalization.

While today's advocates of the most extensive propertization of cultural, scientific and economic relationships point to the success and robustness of intellectual property laws and consider its regulatory potential to be by no means exhausted, critics warn of the blurring of boundaries in, and overextension of, intellectual property law. The *propertization of culture, information, and life*, critics maintain, weakens non-property-based laws and rules, reduces the extent of the commons and increases the obstacles blocking access to cultural and knowledge assets. The critic taking a jurisprudential viewpoint warns against the fraying of intellectual property laws and of *overpropertization*.²² The escalating and sometimes arbitrary use of intellectual property laws for the protection of many new individual interests and special objects, leads, according to critics, to an overextension and overtaxing of proprietary institutions. Introduced unilaterally for

²⁰ See, e.g., as a typical recent example of this: "The Compliance Gap," *BSA Global Software Survey*, http://globalstudy.bsa.org/2013/downloads/studies/2013GlobalSurvey_Study_en.pdf.

²¹ Cf. Horst-Peter Götting, "Die Komplexität von Schutzrechten am Beispiel des geistigen Eigentums," *Comparativ* 16, no. 5/6 (2006): 146–56.

²² Lawrence Lessig, "Reclaiming a Commons," keynote address at "Building a Digital Commons," The Berkman Center, Cambridge, MA, , 20 May 1999, draft 1.01, <http://cyber.law.harvard.edu/events/lessigkeynote.pdf>; Richard A. Posner, "Do We Have Too Many Intellectual Property Rights?," *Marquette Intellectual Property Law Review* 9, no. 2 (2005): 173–85; Drahos and Braithwaite, *Information Feudalism*; Margaret Jane Radin, "A Comment on Information Propertization and Its Legal Milieu," *Cleveland State Law Review* 23 (2006): 1–16; Thomas Dreier, "Verdichtungen und unscharfe Ränder. Propertisierungstendenzen im nationalen und internationalen Recht des geistigen Eigentums," *Comparativ* 16, no. 5/6 (2006): 172–92.

the protection of private commercial interests, these laws sooner or later lose their functional efficacy and social acceptance. One of the principle traditional functions of intellectual property law, to guarantee the balance between individual and general interests, is thus flouted.

5. Legal balance requires consolidation through social, cultural, economic, and political compromises. Regulation based on the intellectual property model helps in the solution of specific problems in cultural, scientific, media, and economic relationships, but then in turn creates and exacerbates other problems. Thus the formation and implementation of efficient and recognized rules becomes a continuous process.

For over two hundred years the participants in this process have referred, first, to the right of the creative individual; second, to the general human or civil right to culture, science, and prosperity; and third, to the principle of balancing diverse interests through the negotiation of rights. However, the experience of the last two hundred years also shows that legal balance cannot be ensured by means of intellectual property law alone, but must be supplemented by complementary principles, norms and procedures which are governed by civil law, constitutional law, competition law, employment law, and international law. A sociohistorical analysis emphasizes that the legal balance remains unstable and of questionable value, if it is not consolidated by social balance and cultural, economic and political compromises. Political analysis makes it clear that the efficacy and acceptance of intellectual property rights in cross-border relations is crucially influenced by the general quality of international relations. International comparative research in legal history and legal anthropology shows that the readiness of stakeholders to regulate cross-border processes through translocal and culturally neutral intellectual property standards increases when these standards are compatible with the stakeholders own institutional development, values, interests, experiences, and expectations. A central role in this process, both in a positive and negative sense, is played by international organizations. However their work is made all the more difficult by the fact that the variety of cultural and scientific assets will grow unceasingly in the long term and the number of stakeholders involved is massively increasing and will continue to do so.

6. In the twentieth and twenty-first centuries the international organizations dealing with intellectual property have increased in importance and gained momentum. Their strength lies in the superiority of their institutional and organizational knowledge; their weakness is their narrow scope and specialization.

In the context of the liberalization of cultural, scientific, and economic relations, intellectual property law is increasingly being assigned a monitoring and management function. The requirements and expectations demanded of intellectual property law are steadily increasing around the world. Debates on the rules for the creation, dissemination, use, and commercial exploitation of cultural and knowledge assets are turning into an ongoing systemic conflict which is emerging in global centers and peripheral countries and which is spreading to ever more issues. The negotiation and implementation of international rules to regulate the cross-border trade in cultural and knowledge assets are also becoming more demanding, both organizationally and culturally. Organizational knowledge is just as important as institutional and legal knowledge and intercultural competence.

In the twentieth century the negotiation of abstract guidelines as well as, increasingly, quite concrete norms shifted more and more into the remit of the international organizations for the protection of copyright, patents, ancillary rights, and trademarks. Although international conventions require ratification by sovereign states, the bodies representing those international conventions that oscillate between negotiating arena and specialist organization are increasing in competence, influence and power. As these organizations initiate, moderate and monitor the negotiation, standardization and international transfer of the concepts and institutions of intellectual property, they take on a central role in the development and expansion of the global regime of intellectual property. For nation-states and the national and international interest groups of producers, intermediaries and end users it is becoming more and more important to take part in the negotiations and decisions of these international organizations.²³

Intellectual property laws have become a central regulatory mechanism in interorganizational relations. Intellectual property law, which

²³ See Lindner, "Power and Development."

had originally been conceived for the regulation of relationships between *individuals*, also increasingly regulates relationships between national, international and transnational *organizations*—such as individual states and alliances between states, cartels, businesses, interest groups, and social movements. There is controversy over which among the growing number of states and international organizations can claim the highest authority and competence in establishing guidelines for the global institutionalization of cultural, scientific, and economic relations.

Several international organizations, among them the WIPO and, more recently, the WTO, are currently vying for responsibility in the development and implementation of internationally valid legal standards. The international organizations for intellectual property have considerably extended their claims to authority and regulation since their inception. They also profited from the much more widely funded institutionalizing efforts of the League of Nations during the interwar years. The League's projects and plans amounted to a multi-institutional regulation of international relations in culture, science, and the economy in which intellectual property rights were to play a central but not exclusive role. This policy was taken forward in principle after World War II by the United Nations. As the UN committees were frequently unable to agree on standards which were acceptable to all parties, the regulatory competence was shifted toward the UN's agencies for culture and economy and particularly toward the specialized agencies for intellectual property (such as WIPO) and free trade (WTO, TRIPS), as the issues are not exclusively related to the system governing culture and science but are rather a question of strength and scope of the remit.²⁴

7. The development and dissemination of intellectual property as a legal entity, cultural pattern and social institution is characterized by ruptures, disjunctions and setbacks.

Since the late eighteenth century the institutions of intellectual property have been steadily increasing in importance at both national and international level. The strengthening and extension of the regime of intellectual

²⁴ Cf. Andréa Koury Menescal, "Changing WIPO's Ways? The 2004 Development Agenda in Historical Perspective," *Journal of World Intellectual Property* 8, no. 6 (2005): 761–96.

property generally intensifies during periods of economic expansion, as well as in times of fundamental cultural, scientific, technical, and political change.²⁵ At a worldwide level, propertization tendencies heightened in the periods around 1870–80, 1900, 1920–30, 1950–60 and since the 1980s. Each time the institutions of intellectual property became more robust, more ambiguous and more polyvalent.

Yet, at any one time strategies of propertization and depropertization maintain a dialectical relationship with one another. In the context of, or as a result of, movements toward propertization criticism of intellectual property regulation increases correspondingly and calls for alternative nonproprietary forms for the institutionalization of cultural relationships become more vociferous.

During the economic and political crises of the twentieth century and in the fascist and dictatorial states of the same period, the intellectual property laws appeared to be comparatively stable. But their underlying effects were ambivalent and varied considerably depending upon political and economic conditions and often upon arbitrary decisions.²⁶ The hierarchy and relationship between the strategies of propertization, nationalization, and globalization was radically changed in line with the dominant political goals and ideology.

In Central and Eastern Europe the system of private property was substituted for a long period during the twentieth century by forms of collectivistic and state-controlled property regimes. Although minor differences between material and immaterial property rights were maintained, the role and function of formal individual intellectual property rights in the spheres of knowledge and culture were much reduced. Yet, authors, inventors and professionals enjoyed quite favorable contractual standards, material compensation, and social prestige—provided they accepted the principles of the political regime and socioeconomic order. The introduction of Western or precommunist legal standards after 1990 brought about an ambivalent combination of formal legal or political emancipation for authors, artists, and other stakeholders on the one hand and economic decline, cultural devaluation and social degradation on the other.

²⁵ See, e.g., Stina Teilmann-Lock, “Legal Designs: Danish Designers as Court-Appointed Experts and the Expansion of the Concept of Copyright,” in the present volume.

²⁶ See, e.g., Lida Barner, “‘Aryanisation’ Expanded? Patent Rights of Jews under the Nazi Regime,” in the present volume.

8. After 1945 the institutions of intellectual property flourished at national and international levels, particularly in the Western world. Since the 1980s, in the context of growth and the accelerated globalization of the culture, media, science and service industries, intellectual property has been changing from a specialized to a central and polyvalent institution. Yet, I hesitate to interpret current changes in the knowledge and communications systems as the expression of an institutional revolution, as a fundamental historical rupture which encompasses all areas of life, or even as the start of a new historical era.

In the course of a long, conflict-ridden and diverse development the basic patterns of intellectual property have taken shape and been implemented in a variety of forms. They determine everyday conventions, forms of practice and mentalities. Intellectual property systems provide structure for relationships of power, competition, and cooperation and lie at the root of claims to both exclusion and inclusion. The fact that for two hundred years intellectual property law has come to regulate more and more areas and facets of culture, science, and the economy, shows that it is a robust institution of the modern world. As more and more tasks in the regulation and management of processes of exclusion *and* inclusion, and processes of domination *and* balancing are today being transferred to intellectual property systems, the risk once again arises (not for the first time in this narrative) that this institution will be worn out and overstretched. Thus, the dominance of one institution has the potential to undermine a pluralist or multi-institutional structure designed to represent different interests.²⁷

In many respects, and in many regions of the world, today's processes of propertization follows a long-term institutional path. The global knowledge system, despite accelerated change and some massive shifts and innovations in communications and knowledge systems, is predominantly characterized by institutional, legal, and discursive continuity. Against the backdrop of the long and conflict-ridden history of the propertization, nationalization and globalization of knowledge, today's stakeholders have, in principle, a rich, body of institutional knowledge at their disposal for

²⁷ See Rainer M. Lepsius, "Institutionalisierung und Deinstitutionalisierung von Rationalitätskriterien," *Leviathan* 16 (1996): 57–69 (special issue: *Institutionenwandel*, ed. G. Göhler).

the analysis, assessment and solution of contemporary problems, as has been demonstrated in this article.

Digitization of the media and the change in information technologies revolutionize how we deal with knowledge and information, but do not necessarily alter the entire institutional, social, cultural, political and economic system. Much depends on the institutional imagination and competence of the stakeholders and whether their dealings with digital media and new information technologies are regulated in such a way as to prevent this fundamental scientific, informational–technological, and media change leading to a profound and universal historical watershed.

9. The concepts of material property and intellectual property have a common historical, cultural, and legal background, and they have similar and often complementary functions. Their concrete or theoretical legal developments may diverge and at times converge. The histories of the material and the immaterial property rights are thus in many respects connected and complementary and should be analyzed together.

Both material and immaterial property rights belong to the more abstract category of exclusive long-term rights or social institutions, which are expected to stabilize social relations and hierarchies, to integrate societies, to support exchanges in markets and in cultures and so on. The histories of material and immaterial property rights are thus in many respects connected and complementary and should be analyzed together.

In Europe, certain elements of the modern property regime have had a long, and often unsettled, history which began with the rise or renaissance of an urban and commercial culture in a few regions of western, southern, central, and northern Europe during the high and late Middle Ages. In the centuries between 1200 and 1800 particular proprietary social norms and legal patterns, and the attitude of possessive individualism were adopted and developed by merchants, craftsmen, booksellers, and artists. They were supported by law schools and lawyers, who revived, adapted, and implemented particular elements of the ancient Roman civil law on land and material property. The concept of property belonged then more to the realms of business, crafts, and urban civilization, whose social values and roles, political procedures, legal institutions, and behavioral standards

differed from those of the dominant feudal, aristocratic and absolutist culture and those of the rural sphere. Until the comprehensive institutional revolution of the early 1800s the institution of *privilege* had determined economic, social and cultural relations both in the rural and in the urban world. Privilege-based relations subsequently began to be converted into property-based relations.

A coherent and universal legal regime of individual property rights, which included intellectual property rights, was installed in Europe between the late eighteenth and the late nineteenth century. Private property rights at that time mainly furthered the interests of owners and supported the rise of a system of formal legal equality on the one hand, but also of real social, economic and cultural inequality and exclusion on the other. This was eventually criticized on many levels by individuals, interest groups, states, and international organizations, who were involved in disputes and negotiations concerning the content, forms, functions, and extension of material and immaterial property rights.

Historical, sociological, and legal studies about the rise, diffusion, transfer, adaption, hybridization, and sometimes radical rejection of proprietary institutions in Europe and the world continually show that the forms and functions of intellectual property rights and institutional paths of propertization (which is often seen as a central element of modernization) are similar in some respects but divergent in others. Differences and distinctions motivate a steady process of negotiations regarding the assimilation and transfer of customs, institutions, and laws. Although the basic arrangements and rules for social, cultural, political, and economic cooperation and exchange have become more stable and generally accepted over the course of time, interest groups and stakeholders cyclically demand new rules and try to revise the national and international customs, codes, constitutions, and conventions.

Social and political tensions and conflicts on the one hand and cultural and technical innovations on the other have led to new variations and types of property rights and intellectual property rights. In the nineteenth and twentieth centuries the regime of absolute and encompassing private property rights was challenged by de- and repropertization programs which were in turn democratic, egalitarian, nationalist, racist, and religious and which were aimed either at strengthening the autonomy and

rights of citizens and individuals or at reenforcing collective and communitarian private property rights. New modes of social exclusion and inclusion were introduced.

European and global history shows that while property regimes become more homogenized and coherent in the twentieth century, because societies opted either for the liberal or for the state-socialist model, there was also a global and long-term trend toward functional differentiation of proprietary institutions and toward hybrid and entangled property regimes. Norms, which had originally been conceived for specific purposes in a particular cultural, economic, legal and political environment, were transferred to new functional spheres and new social and cultural contexts.

From the perspective of a comparative historian it is quite evident that concepts of private property, state-owned property, and cultural commons have been adapted in order to conform to distinct economic, legal, and political systems in the last two hundred years. The original link between liberal values and material and immaterial property rights was blurred by all kinds of imperialist, fascist, nationalistic, and communist dictatorial and totalitarian regimes in the twentieth century. A current example of an arbitrary or pragmatic hybridization of property rights is China, where the ruling Communist Party and regime declare that private ownership of agricultural land is and remains illegitimate and illegal in principle (because it is regarded as a symbol of the prerevolutionary feudal system) while they simultaneously introduce and enforce private property laws for industrial and financial assets, and for individual copyrights and patents.

10. Even countries and civilizations who are pioneers in propertization do not regulate their cultural, artistic and scientific relationships exclusively on the basis of property, but rather multi-institutionally.

Ultimately the history of cultural, scientific and economic relations and processes shows that they have not at any time been regulated exclusively with reference to the intellectual property model. Strategies and processes of propertization are relativized in each case by alternative and complementary institutionalization processes, even in those countries that consider themselves historical pioneers in intellectual property and seek to spread the concept globally. In large sections of the world and

across long stretches of history major areas of knowledge are regulated by bureaucratic rules and organizations, for example. Nationally and internationally communication, cooperation and the exchange of information are also regulated on the basis of national, ethnic, or ideological solidarity, professional or academic collegiality, or on the basis of donation, affinity and friendship, as well as aesthetic preferences.²⁸

In the past as well as today, such institutionalization strategies are often understood primarily as radical alternatives to liberal and individualistic programs and strategies of propertization, but they may of course also complement each other. Either way we can assert that the multi-institutional regulation of culture, science and communication has just as long and similarly robust a tradition as the regulation of cultural, scientific, and economic relationships based on the property model. Both came about in the period around 1800 and both are central structural elements of modernity.

²⁸ See H. Siegrist, "Professionelle Autonomie in der modernen Gesellschaft, Wissenschaft und Kultur. Einführung," in *Professionen, Eigentum und Staat*, 15–38; Siegrist, "Die Regulierung kultureller Beziehungen im Zeitalter des geistigen Eigentums." This is systematically demonstrated, e.g., by Pierre Bourdieu, *The Rules of Art: Genesis and Structure of the Literary Field* (Palo Alto: Stanford University Press, 1996); David Philip Miller, "Intellectual Property and Narratives of Discovery/Invention: The League of Nations' Draft Convention in 'Scientific Property' and Its Fate," *History of Science* 46, no. 3 (2008): 299–342; Charles E. McClelland, *Prophets, Paupers, or Professionals? A Social History of Everyday Visual Artists in Modern Germany, 1850–Present* (Oxford: P. Lang, 2003); Siegrist, "Professionalization, Professions in History," in *International Encyclopedia of the Social and Behavioral Sciences* (IESBS), ed. N. J. Smelser and P. B. Baltes (Oxford: Elsevier Science Publishers, 2001), 12154–12160; Paul J. DiMaggio, "Constructing an Organizational Field as a Professional Project: US Art Museums, 1920–1940," in *The New Institutionalism in Organizational Analysis*, ed. W. W. Powell and P. J. DiMaggio (Chicago: University of Chicago Press, 1991), 267–92; Rudolf Stichweh, ed., *Wissenschaft, Universität, Professionen. Soziologische Analysen* (Frankfurt a. M.: Suhrkamp, 1994), 278–336; R. Jessen and J. Vogel, eds., *Wissenschaft und Nation in der europäischen Geschichte* (Frankfurt a. M.: Campus, 2002).

2

Power and Development: The Revision Conferences of 1967 and 1971 of the Berne Convention and the Universal Copyright Convention

JONAS GÖRTZ

Introduction

At the conclusion of the 1967 revision conference of the Berne Convention for the Protection of Literary and Artistic Work (BC), the president of the British Copyright Council, Sir Alan Patrick Herbert, issued “A Call to Arms”: In a foreword to an elaborate commentary on the diplomatic gathering in Stockholm, the novelist and playwright endeavored to elucidate “with clarity the disastrous trends which are now menacing authors’ rights throughout the world.” The anguish expressed by him reflected very specific events that had occurred during the negotiation processes of the international copyright regimes during the preceding years:

Everyone must be anxious to aid the developing countries: but to offer aid at the expense of individual authors, composers and publishers (as provided in the Protocol to the new Stockholm Act of the Berne Union) is unjust and unjustifiable.... The Protocol entangles them, and thus undermines the basis of copyright protection throughout the world. This trend must not only be stopped; it must be reversed. Authors and publishers, and their organizations, must protest with united voice against this conspiracy to erode and diminish the various protections which—with much effort and difficulty—they have acquired during the past two hundred years.¹

¹ Alan Patrick Herbert, “A Call to Arms,” in *The Stockholm Act of the Berne Copyright Union: Protocol Regarding the Developing Countries*, ed. R. F. Whale (London: British Copyright Council, 1968), 3.

The so-called Protocol Regarding Developing Countries (Protocol) had just been appended to the international BC treaty text that had undergone several amendments and revisions since its inception in 1886. A number of newly independent Asian and African countries, considered to be “developing,” were aided by the Swedish government and the United International Bureaux for the Protection of Intellectual Property (BIRPI), and had made demands for special provisions to be made for them in the international copyright system. The legacy of their colonial pasts enabled them to claim the moral and legal high ground and draw attention to the visible asymmetries between their standards of living and those of the former colonial powers. The claims added a new dimension to the international copyright regimes and were at odds with the interests of the mostly European founders of the BC, such as the United Kingdom, France and Germany. They had established the convention on three principles and aims: reciprocity, which meant the mutual recognition of national copyright titles; equality in the treatment of natives and foreigners in the respective national copyright laws; and, as far as possible, international alignment and harmonization of national copyright laws.

Those principles, which were largely uncontested until the early 1960s, were now subject to negotiation and political change. This came in a climate where mass decolonization processes were linked to a deepening of the Cold War in the Global South, culminating in the 1960s when the ratio between so-called developed and developing nations in international organizations such as the United Nations General Assembly (UNGA) was dramatically reversed. In 1960 alone, seventeen countries from the Global South joined the UN. It characterized the 1960s as the “Development Decade,” both in terms of a broad set of international policies and a specific mentality prevalent in the minds of policy makers who were deeply influenced by theories of modernization and development. The situation as regards international copyright law was further complicated by the establishment of the Universal Copyright Convention (UCC) by the United Nations Educational, Scientific and Cultural Organisation (UNESCO) in Geneva in 1952. In that period, international law underwent a broader paradigm shift, from forms “in which sovereign equality ignored inequality of power and, by the same token, ignored inequality

of development”² to constructions more sensitive to global asymmetries. Representatives of newly independent nations now criticized the three universal pillars of international law: reciprocity, nondiscrimination, and equality, as obstacles to their own development and progress. Postulating a state of “underdevelopment,” these “Third World” countries intended to alter the pillars in order to compensate for inequality, nonreciprocity, and differential treatment, leading effectively to a duality of norms: those in North–North relations versus those in North–South relations.

This international situation that arose after 1945 had tremendous effects on the way Intellectual Property Rights (IPR) were negotiated, as Isabella Löhr attests:

Since then, global copyright law has had to struggle with tensions between parties pushing for the enforcement and protection of IPR and parties emphasizing their dependence on the transfer of knowledge, culture and technology and thus claiming a less exclusive and economically focused IPR regime.³

The new directions that debates on the regulation of international copyright were taking must be viewed in the larger context of political and economic adjustments (in the field of human rights, for example). The new attitudes certainly provoked the resistance of both private and public interest groups. A brief look at the historical stakeholders and parties involved reveals the complexity of the object of study: copyright holders organized into groups of authors and publishing associations; national governments acting as legislatives for nationally based copyright laws; international organizations such as BIRPI or UNESCO tasked to administer international copyright regulation but also with their own agenda and enforcement issues; not to mention a large number of individuals acting on their own behalf. Regulating international copyright law is

² Paul Berthoud, “UNCTAD and the Emergence of International Development Law,” in *UNCTAD and the South–North Dialogue: The First Twenty Years*, ed. Michael Zammit Cutajar (Oxford: Pergamon Press, 1985), 72.

³ Isabella Löhr, “The Propertisation and Internationalisation of Culture in the 20th century,” *Comparativ. Zeitschrift für Globalgeschichte und Vergleichende Gesellschaftsforschung* 21, no. 2 (2011): 45.

therefore not an anonymous, purely technical process but has always been a complex process charged with cultural and political suppositions and dispositions: “The genesis of protective rights has neither been inevitable, nor has it followed an inner, path-dependent and perpetuating logic of factual constraints.”⁴ In short, it has been constructed and reconstructed by historical stakeholders with specific motives, interests, and scopes of action.

The research interest of the present analysis, therefore, lies in the specific interests of the various historical stakeholders. How and why were the regulations of the international copyright regimes linked to international policies of developmental aid? How did the negotiations between the early 1960s and the revision conference in Paris in 1971 impact on international copyright regimes? Is it valid to speak of their “politicization”? Are the negotiations between developing and developed countries, between private, public, and state stakeholders in the respective period merely an episode within a larger process of IPR “expansion,” as postulated by some?⁵ And finally, what are the roles of national institutions and international epistemic communities within these processes?

Cultural and social historians have only started analyzing IPR in the past few years. The period between 1945 and the 1990s has certainly been somewhat overlooked. This analysis intends to help fill the gap by taking a brief glance at the events and processes of the 1960s. It is roughly divided into three parts: The first part deals with a number of smaller meetings and conferences leading up to the revision conference in Stockholm in 1967. Part two will take a closer look at the constellations and conflicts revealed by that conference, while the third part discusses the short period leading up to the revision conference of 1971 in Paris, where interim compromises and dispositions in the disputes were inscribed into both the BC und the UCC. The year 1971, therefore, forms an initial hiatus in the development of international copyright regimes and serves as the focal point for this discussion.

⁴ J. Hofmann and C. Katzenbach, “Einführung,” in *Wissen und Eigentum. Geschichte, Recht und Ökonomie stoffloser Güter*, ed. Jeanette Hofman (Bonn: Bundeszentrale für politische Bildung, 2006), 11 (my translation).

⁵ Eva Hemmungs Wirtén, *No Trespassing: Authorship, Intellectual Property Rights, and the Boundaries of Globalization* (Toronto: University of Toronto Press, 2004), 10.

Geneva to Stockholm, 1952–67

After the Second World War, the United States nourished a growing export industry for cultural goods. As it had not yet joined the BC, it increasingly became the focus of attention for European interest groups. However, after 1945 the US pushed for the establishment of an alternative copyright convention: Under the auspices of UNESCO, the UCC was founded in 1952 with the “desire to assure in all countries copyright protection of literary, scientific and artistic works.”⁶ In practice, this meant providing conditions suitable for developing nations, since they formed the bulk of countries remaining outside the established conventions of the UCC and BC, in addition to several former Eastern Bloc countries. According to Barbara A. Ringer, assistant register of copyrights in 1967 in the United States Copyright Office, the “leadership” of the US in shaping the UCC was both a turn in US policy toward its isolationism in international copyright matters and a response to the perceived incompetence of the “existing multilateral copyright arrangements” in coping with the needs and demands of developing nations.⁷ The dual objective of linking the US cultural industry to rapidly globalizing markets while, at the same time, binding newly independent and developing nations to an international copyright convention without joining the BC was headed for direct collision with the interests of the BC architects by 1967. The UCC provided considerably lower protection standards explicitly to meet the needs of developing nations. Since 1952, UCC and BC protection standards have always been compared to one other, each serving a membership that in part overlapped with the other and in part was unique to them. The function of the UCC as a “common denominator convention”⁸ originated from similar principles to the BC, principles such as national treatment. The two conventions were initially prevented from competing with one another: the so-called “Berne Safeguard Clause”⁹ in the UCC prevented countries that were party to both the UCC and BC from withdrawing

⁶ Quoted from the preamble of the respective founding resolution, No. 2937.

⁷ Barbara A. Ringer, “The Role of the United States in International Copyright: Past, Present, and Future,” *Georgetown Law Journal* 56 (1967/1968): 1050–51.

⁸ *Ibid.*, 1061.

⁹ UCC Article 17 with appendix of the 1952 treaty text.

from the latter in order to make use of the considerably lower protection standards of the former. In the light of decolonization in the 1950s and 1960s an increasing number of nations were targeted by both conventions for membership of one or both, which brought their ambivalent relationship with each other to the brink of diplomatic crisis. Further, the loophole used by American publishers whereby simultaneous editions in Canada and other Berne Union member states provided them with a “backdoor to Berne,” as it came to be called, had been long been a source of friction between authors and publishers.

The first concrete step linking matters of international developmental aid and the regulations of international copyright regimes came from a mutual initiative by BIRPI and UNESCO to hold an “African Study Meeting on Copyright” in Brazzaville, Congo, in 1963. UNESCO had already prepared the ground in the 1960 resolution of the eleventh session in the UNGA. In the preamble to Resolution 2.4, “Improvement of the teaching of the basic sciences in higher education,” Paragraph 2.43 read:

Realizing that the development of a programme for cheap production of these books would involve the question of copyright and payment of royalty and that it would be necessary to undertake an examination of the terms on which the publishers could be persuaded to part with copyright of their books and the arrangements that could be made for the payment of royalty in the currency of the country concerned,

Authorizes the Director-General to undertake an early examination of these and allied problems in order to help in the formulation of suitable programmes for cheap production of scientific and technical books in the underdeveloped countries, on a national and a regional basis.¹⁰

Paragraph 4.3 concerning “copyright” authorized UNESCO’s secretary-general “[t]o participate, at the request of Member States, in their activities concerning the international and national protection of

¹⁰ UNESCO, *Records of the General Conference, Eleventh Session* (Paris: UNESCO, 1961), 39.

copyright.”¹¹ Within those sessions, developing countries such as India pushed for supporting seminars to be organized in the fields of educational and cultural policies in order to help young African and Asian developing nations.

The five-day Brazzaville seminar was attended by representatives of twenty-three African states, who were a mixture of museum employees, schoolteachers, artists, and other employees from the educational sector. They were neither copyright experts nor official representatives of their respective nations. The seminar was observed by representatives of Italy, the United States, Czechoslovakia, several nongovernmental organizations (NGOs), and experts from UNESCO and BIRPI, all of whom also provided advice.¹² The goals and general mindset of the organizers can be deduced from the opening remarks of the Congolese minister for education, youth and sport, Prosper Gandzion:

Up to now the system of protection of copyright in the African countries and Madagascar had been that applied in the countries administering them. Our accession to independence implies that we also have our own legislation. There can be no question, however, of isolating ourselves or of displaying particularism by creating purely national or purely African regulations. We are very well aware that intellectual works know no frontiers, and that mankind as a whole should have access to all knowledge whencesoever it comes. We are therefore prepared to adapt ourselves to a common rule, but first we should draw up, within the framework of that rule, our own legislation on the subject. Our young States are eager for access to the best works of our nations; but we also wish to be able to export our own works, and it is for this reason that we have the duty to protect our native authors and provide them with the same guarantees as the others. Furthermore, we claim—if I may be permitted to use the term—not to enter the concert of nations with empty hands. We have our philosophy, our folk literature and our painters, sculptors,

¹¹ Ibid., 50.

¹² RADA/10: African Study Meeting on Copyright (Brazzaville, 1963), Annex A: List of Participants.

musicians and dramatic groups. Tomorrow we shall have our engineers, our scholars, our research workers. We are therefore in a position to make our contribution to the world, and hence to acquire the right to draw upon the vast store of knowledge.¹³

This double strategy, to adopt the European institution of national IPR to protect “the African heritage”¹⁴ while demanding provisions to make up for economic shortcomings, was supported by all African attendees with a verbal endorsement from the Tunisian delegate:

Intellectual nourishment can be of two kinds: those obtained from the African cultural heritage and which should be encouraged and those coming from abroad which should be obtained without the payment of any rights. The essential thing, however, was that Africa should not pay too high a price for the fruits of important knowledge.¹⁵

This fundamental disparity with the principles the BC was based on, did not meet much opposition until after the revision conference in 1967. The seminar concluded that African experts were to be involved in future revisions of international copyright conventions and that a national model copyright law was to be drafted with the help of European “experts.” The cultural field of “folklore” that would be much affected by the convergence with European copyright concepts required specific considerations in order to establish a legal basis for the protection of such nonindividualistic forms of culture and art.

These developmental initiatives closely paralleled more conventional and technical ones in nature. Various expert committees and preparatory meetings were hosted between 1961 and 1965 by BIRPI and the Swedish government, which agreed to host the subsequent revision conference. The main focus of these negotiations was the strengthening of international copyrights by taking new forms of media such as film and cinematic

¹³ BIRPI: African Study Meeting of Copyright, Brazzaville, August 1963 (Geneva, 1963), 81.

¹⁴ *Ibid.*, 80.

¹⁵ RADA/10: African Study Meeting on Copyright (Brazzaville, 1963), Report, 10.

works into consideration. One of those highly technical meetings had already dealt with the special needs of developing countries.¹⁶ Organizations such as the European Broadcast Union (EBU) remarked that the future revision conference:

will have failed its mission if it does not make every allowance for the needs of these countries and if it insists that they too must conform, without exception, to the high standard of protection attained in the course of successive revisions of the Convention.¹⁷

The demands from Brazzaville in 1963 were formally discussed but were not mentioned in the final reports and resolutions of these seminars. These study groups were complemented by the above-mentioned attempts to draft a model law, particularly for new African nations. UNESCO and BIRPI realized this objective in late 1964 in Brazzaville with representatives from seven African nations in attendance.¹⁸ Under the motto of “African unity,” the opening address by the UNESCO representative Machado stated that “[a]n exclusively African conception should be worked out in this connection, in conformity with the realities and requirements of the African continent.”¹⁹ The final resolution of this meeting recommended the BC be revised “in order to secure a reduction in the minimum term of protection and the possibility of adjusting the clause on special arrangements to take better account of the realities of the African continent.”²⁰ Further, “a regional African Convention which would adequately meet African requirements in the field of copyright and contribute toward the promotion of their economic, social and cultural development” was envisaged under the supervision of the Organisation

¹⁶ DA/20/2: General Report of the Swedish/BIRPI Study Group Established on 1st June 1963. For a more detailed account of the proceedings during that meeting, see Charles F. Johnson, “The Origins of the Stockholm Protocol,” *Bulletin of the Copyright Society of the USA* 18 (1970/1971): 113.

¹⁷ DA/20/14: Observations of the EBU on the Preliminary Proposals for Revision of the Berne Convention, Committee of Advisory Experts (1963), 2–3.

¹⁸ DA/23/17: General Report of the Committee of African Experts to Study a Draft Model Copyright Law (Brazzaville, 1964).

¹⁹ *Ibid.*, 1–2.

²⁰ DA/23/17: Appendix 3 of the Resolution, 2.

of African Unity (OAU, later African Union, AU).²¹ It was at this point that the study group of BIRPI and the Swedish government undertook a “dramatic shift”²² of focus by discussing a new article enabling developing countries “to make reservations in respect of the provisions of the Convention on certain points.”²³

In summer 1965, a meeting of the Committee of Governmental Experts, initiated by BIRPI, hosted governmental representatives from thirty-five of the fifty-four BC contracting parties and a number of observers from countries such as the United States, who were not members of the Berne Union, as well as various intergovernmental organizations (IGOs) and NGOs. The proposed article granting provision rights for developing countries was at the heart of the debates. They sidestepped questions of the exact definition of a developing country, the exact point of time in a developmental stage when the respective provisions could be demanded as well as the duration of validity and qualitative limitation of the provisions. It is worth noting that the definition of a developing country from the point of view of an international legal instrument such as the BC had not been clarified at this point.²⁴

To those involved the situation presented a dilemma for “exporters of cultural goods” who wanted to strengthen international copyright standards while reaching as many new contracting parties to the established conventions as possible, but also to “user nations” who sought affordable access to knowledge and art for their own development while maintaining the ability to protect their own cultural industries. A report by BIRPI and the Swedish study group revealed the underlying motivation for the core contracting parties of the BC to grant certain provisions even if it meant temporarily compromising their “achievements”:

The objection has of course been made that if the developing countries find themselves unable to organise protection as effective as

²¹ Ibid.

²² Johnson, “The Origins of the Stockholm Protocol,” 120.

²³ DA/22/2: General Report of the Swedish/BIRPI Study Group Established on 1st July 1964, 83–85.

²⁴ For the complete documentation, see: DA/22 Diplomatic Conference of Stockholm, Committee of Governmental Experts (Copyright), 1967.

accession to the Berne Convention would imply, they ought to become parties to the Universal Copyright Convention, instead of the Berne Convention. There is no doubt, however, that the adoption by the developing countries of copyright legislation within the framework of the Berne Convention would be of considerable advantage to the authors. Conditions in several of these countries will certainly eventually improve and one of the consequences of this development will be the increasing exploitation of literary and artistic works. In these circumstances, it will naturally be to the authors' advantage if protection has been organised from the start, on the pattern of the Berne Convention.²⁵

Most did not realize the complexity of the international situation until after the revision conference in Stockholm. Two international copyright conventions took place; they were administrated by UNESCO and the World Intellectual Property Organization (WIPO), which was established in 1967. A wide spectrum of countries was defined as "developing," most of them having just acquired formal independence, and only a few with a notable cultural export industry. The situation was further complicated by the political climate of the Cold War as well as the postcolonial tensions surrounding demands for modernization, nationalization, and development.

The Revision Conference of the Berne Convention in Stockholm, 1967

Until 1967 the established routine for BC revision conferences had been meetings "for the purpose of introducing improvements intended to perfect the system of the [Berne] Union."²⁶ These occasional gatherings of copyright experts and diplomats had therefore been highly technical in nature. The ambition to universally extend the convention's validity left little space for explicitly political agendas. Thus, from the perspective of

²⁵ DA/22/2: General Report of the Swedish/BIRPI Study Group Established at 1st July 1964, 85.

²⁶ Article 24, 1, of the Brussels text, 1948, in World Intellectual Property Organization, *Records of the Intellectual Property Conference of Stockholm, June 11 to July 14, 1967* (Geneva: WIPO, 1971), 24.

the inner core of founding nations, such as Great Britain and France, who had strong publishing industries, the political dimension evolving around newly independent nations and US policies was highly unwelcome. However, the crucial point lay in the statute that “[n]o alteration in this Convention shall be binding on the [Berne] Union except by the unanimous consent of the countries composing it.”²⁷ This, therefore, gave every party to the convention a de facto veto right over revision efforts. Furthermore the “evolution”²⁸ of universal copyrights worldwide was markedly disrupted and compromised by the fact that some developing countries were already contracting parties to the BC or to the UCC, some were party to both, and some to neither. The constellation of the developing countries’ status proved to be highly dynamic and fluid.

Of the fifty-seven nations who were contracting parties to the Berne Convention in 1967 almost half were considered to be developing countries in line with UNGA procedures. The established practice was that a country had to register with the UNGA to claim “developing” status. The aforementioned struggles to find a definition suitable for IPR regimes had still not been satisfactorily resolved. “Developing” countries in Latin America in particular were seen as having a strongly exporting publishing industry that rendered them unsuitable for measures that would give them advantages over other countries with strong cultural industries.²⁹ The president of the German Internationale Gesellschaft für Urheberrecht (INTERGU), Erich Schulze, therefore pointed out that “[i]t would be too simple to divide the world into developing nations and others.”³⁰

The revision program was published for consultation almost a year before the actual conference commenced in June 1967. One observer noted that there was sparse reaction to the document and barely any

²⁷ Article 24, 3, of the Brussels text, 1948, in *ibid*.

²⁸ “Evolution” has been a widely applied term since the late nineteenth century and was meant both territorially and qualitatively. This referred to the two goals: worldwide dissemination of the concept and constant technical and legal improvement. The latter included, for example, adaptations to new forms of media such as photography, cinematography, or satellite communications. Exemplary is R. F. Whale, *Copyright: Evolution, Theory and Practice* (London: Longman, 1971).

²⁹ Franz-Wilhelm Peter, *Das Stockholmer Protokoll für die Entwicklungsländer. Gefahr für das internationale Urheberrecht* (Frankfurt a.M.: Börsenverein des Deutschen Buchhandels, 1970), 16.

³⁰ Erich Schulze, *Förderung des Welturheberrechts durch Entwicklungshilfe* (Berlin: Vahlen, 1970), 31 (my translation).

commentary on it.³¹ By the time the binding diplomatic negotiations took place, only a few of the governments from developed nations seemed to have realized the potential significance of the intended alterations. A later comment by Ringer, who was part of the observing US delegation, emphasizes “that the developing nations were well organized and prepared to fight, and that the developed countries were in disarray.”³² The conference was divided into five main committees, of which the second was to deal with the special needs of developing nations. The central document was the Protocol Regarding Developing Countries (Protocol). This six-article instrument was the result of the aforementioned preliminary meetings, which had started in Brazzaville in 1963. The Protocol was to be made an integral part of the convention text, which would have meant that accession and membership to the BC could only take place if it were accepted.³³

The positions adopted by members and nonmembers concerning the adoption of the Protocol as an integral part of the convention mirrored the positions held prior to the revision conference. However, the tone and choice of words sharpened increasingly with the ongoing debates. While developing countries such as India or Tunisia demanded strong provisions in order to guarantee their development, European countries such as Great Britain remained skeptical at best and referred to the rights of authors, which would be jeopardized. Interestingly, Latin American developing countries, such as Mexico, also strongly opposed the Protocol, as they perceived it as a threat to their own cultural export industry. Private interest groups like the International Writers’ Guild (IWG) demanded developmental aid solely on financial terms without amendment to the established international copyrights. National and private capital interests proved to be as strong as the urge for international cooperation. The final version of the Protocol presented a compromise between all these interests.

The most significant contents of the Protocol were as follows: first, the definition of a “developing country” conformed “with the established practice of the General Assembly of the United Nations” where each country in question had to apply for the status itself. Second, the

³¹ Ringer, “The Role of the United States in International Copyright,” 1067.

³² *Ibid.*, 1070.

³³ Articles 21 and 28 of the Stockholm text regulated both the integral character of the Protocol and the need to adhere to it in the case of accession.

effective period of the Protocol's reservations was set at ten years, after which the respective developing country was to reevaluate its status and either withdraw from any or all reservations provided by the Protocol or extend them until it acceded to the convention at the next revision conference. Should the UNGA alter the country's status from "developing," its government could uphold the reservations for a further six years. Third, the permitted reservations included shortened terms of protection, i.e., life plus twenty-five years instead of life plus fifty years for literary and cinematographic works and life plus ten years instead of twenty-five for photographic and artistic works.³⁴ Fourth, a compulsory license system for translations was introduced, which significantly liberated translation rights in cases where a translation had not been published within three years of the original publication. This was extended if negotiations had verifiably failed. Fifth, national nonexclusive licenses could be obtained for reproduction of a work for the purpose of "educational and cultural use" if the work had not been published in the respective country within three years of the original publication. Sixth, national broadcasting rights could be interpreted much more freely without impairing the authors' moral rights to their works. Seventh, the protection of literary and artistic works could be defined as for purposes of "teaching, study and research in all fields of education." This meant that protected works, be they translation, reproduction, broadcasting or other, could be used without time limits or formalities, as long as domestic legislation guaranteed standard compensation as for all other domestic authors.³⁵ The status of the Protocol proved to be crucial for the debates to come: even though it was drafted as an appendix to the convention text, it became an integral part of it. This meant that accession to the whole convention in its 1967 form was only possible by agreeing to the provisions guaranteed in the Protocol. There was, however, an option to accede to the organizational structure of 1967 (joining the newly established WIPO) and to accede to the 1948 convention as drafted in Brussels. Essentially, this meant that countries with strong publishing industries could choose between a convention that

³⁴ Article 7, paragraphs 1–4, of the Stockholm convention text.

³⁵ World Intellectual Property Organization, *Records of the Intellectual Property Conference of Stockholm, June 11 to July 14, 1967*, 1313–19.

was not up-to-date with modern technology and did not make provisions for developing countries or a convention that guaranteed protection for the latest technology but included provisions for developing countries. Of course, countries that had remained outside all international copyright conventions could always choose the option of “free-riding” by refraining from all international obligations. The fear of state-organized piracy became a specter that repeatedly visited the negotiation processes. The compromise that was finally agreed on ultimately disappointed most stakeholders.

Stockholm to Paris, 1967–71

Predictably, the outcome of the Stockholm revision conference was very poorly received by the majority of the negotiating parties. Ringer described it as “probably the worst experience in the history of international copyright conventions.”³⁶ We remember the polemic “call to arms” by Sir Alan Patrick Herbert that introduced this chapter, and that it was made at the conclusion of that conference. Again, the results were measured against the achievements of the UCC, as Ringer observes: “What started out as cooperation and coexistence with Berne and the UCC has turned into polite but fierce competition, and the ultimate outcome is very much in doubt.”³⁷ She saw the altered international political landscape of the 1950s and 1960s as the main catalyst for the end of this cooperation: “However, the emergence of newly independent countries seeking to import foreign educational materials on favorable terms began to impair this accord in the late 1950s and the problem reached crisis proportions in 1967.”³⁸

Covering the founding of WIPO, the debates surrounding developing countries and revisions to the core of the convention (Articles 1 to 20), as well as the revision of the Paris Convention for the Protection of Industrial Property (PC), the revision program was vast and complex. This may be one reason why reactions to the revision program before the conference

³⁶ Ringer, “The Role of the United States in International Copyright,” 1070.

³⁷ *Ibid.*, 1065.

³⁸ *Ibid.*, 1070.

and to the actual results of the Stockholm conference were slow to formulate. Bureaucratic processes further hindered quick or smooth responses as did the fact that most documents had to be translated before governments could seriously consider signing or ratifying the convention. In general, private interest groups such as those representing publishing houses and authors seem to have been quickest to gather the available information and respond publicly. Their statements revealed their anger and disapproval at the fact that their respective national governments had yet to sign and ratify the convention. The publishing lobbies and interest groups acted in self-defense, as the provisions for developing countries were publically debated and referred to variously as “a ticking bomb of dangerous principles on the flagship of Copyright” and “a tunnel under the walls of the Copyright Fortress.”³⁹ Their mutual, if not centrally coordinated, strategy was to refer to development aid programs “as the job of the general public,”⁴⁰ i.e., the state. However, the Protocol was seen as penalizing private individuals, unjustifiably so, even in the light of their nation’s colonial pasts:

It has become evident that there are many misconceptions on the part of the newer developing countries about the significance, moral and material, of the protection of authors’ works. This is not altogether surprising for, again conspicuously in the former British colonies, no effort was apparently made by the colonial Power to explain that significance, so that the part which good copyright legislation can play in promoting the development, among other natural resources, of the literary, musical and artistic talents which the peoples of these countries have shown that they possess was not readily appreciated by them. That the developing countries are entitled to cultural as well as economic aid is not generally disputed, but it would not be right to envisage the furnishing of the former solely at the expense of authors and publishers.⁴¹

³⁹ Alan Patrick Herbert quoted in Schulze, *Förderung des Welturheberrechts durch Entwicklungshilfe*, 13.

⁴⁰ Schulze, *Förderung des Welturheberrechts durch Entwicklungshilfe*, 16 (my translation).

⁴¹ Whale, *Copyright*, 182.

Furthermore, as the American administration opposed the Protocol as a whole, talks between Europeans and the United States regarding US membership of the BC became strained. The American delegates observing proceedings soon announced that under these circumstances, an accession by the United States to the convention would now be extremely unlikely: "The long aspired to accession of the United States was precluded by the Protocol, just when it had finally seemed so near. This negative effect of the Protocol is far more damaging than the withdrawal of several developing countries from the Berne Convention would be."⁴² These words of a German copyright lawyer are representative of the disappointment of a huge lobby group of publishers and authors. Unsurprisingly, national governments, such as the British, declared their strong opposition to the ratification of the Protocol in the year following the Stockholm revision conference. Interestingly, the German government saw its position as something of an intermediary between former colonial powers and newly independent countries. A comment by the then federal minister of justice, Gustav Heinemann, reveals that political agendas and the interests of private pressure groups were at odds with each other in the aftermath of the conference: "As it were, they want to make us the forerunner of rejecting the Protocol, as we are not reputed to be an old colonial power."⁴³ Even though the politician was explicitly in favor of a German ratification of Articles 1 to 20 and the Protocol, Germany, along with most countries, stopped short of ratification. This was the state of affairs on which future negotiations were based.

As this stalemate was in the interests of no party, several meetings of copyright expert groups and diplomats were organized, "with a speed unusual in international relations."⁴⁴ In an atmosphere of mutual disillusionment, the hardened fronts returned to the negotiating table, but more out of an omnipresent notion of catastrophe than a will to compromise: On the one hand, the developed countries refused to ratify the Stockholm version of the BC and on the other, most developing countries were frustrated by the prospect of the potential failure of the Protocol and

⁴² Peter, *Das Stockholmer Protokoll für die Entwicklungsländer*, 34 (my translation).

⁴³ Gustav Heinemann, quoted in Peter, *Das Stockholmer Protokoll für die Entwicklungsländer*, 45.

⁴⁴ Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (London: Kluwer, 1987), 124.

pushed for further negotiations. The nexus of BC and UCC, symbolized in the Berne Safeguard Clause, came to the fore of the debates, as most interests intersected over this issue. The Europeans sought to strengthen and expand copyright standards worldwide; many developing countries expressed the desire to join the UCC exclusively, while the United States would only allow the latter with a raised level of standards within the UCC. Consequently, all protagonists agreed to the establishment of the “International Copyright Joint Study Group” in early 1969, which was charged with addressing the following:

- (a) the establishment of an international mechanism for permitting developing countries a greater degree of access to protected works while respecting the rights of authors;
- (b) the needs of developing and developed countries in the international copyright field, particularly that of education, the effect of the regime of international copyright relations on the satisfaction of these needs, as well as any improvements that could be made in this respect, taking into account the interests of authors with a view to encouraging the creation of intellectual works;
- (c) the problems arising from the existence of two copyright conventions of world-wide scope and possible methods for providing links between them.⁴⁵

The study group, called the Washington Group after the location of its negotiations, was mutually organized by BIRPI and UNESCO and its objectives were: to jointly revise the BC and UCC; to delineate conditions for the abolishment of the Berne Safeguard Clause; to discuss the consideration of private interests outside the principle of material reciprocity; and to prepare the separation of the Protocol from the BC.⁴⁶ The results of the negotiations were deemed so successful by most parties that the administrative bodies of the BC and UCC formed ad hoc preparatory committees to work toward another revision conference to be held in 1971

⁴⁵ Resolution in the final report of the “Extraordinary Session of the Permanent Committee of the International Union for the Protection of Literary and Artistic Works (Berne Union)” (Paris, February 3 to 7, 1969), *Copyright* 3 (1969): 52.

⁴⁶ Appendix B of the final report of the “Joint Study Group,” *Copyright* 11 (1969): 227.

at the UNESCO headquarters in Paris. As the most influential members of the respective bodies were represented at national level in both committees, the coordination and cooperation went comparably smoothly. The “Washington Recommendation,” the final report for the preparation of the Paris revision conference in 1971, was therefore acknowledged by most parties.

The Protocol was amended and its potential to limit copyrights and authors’ rights was moderated. Its recommendations, which were almost fully realized during the much shorter revision conference in Paris, included: its integral status within the BC, the definition of a “developing country,” and the formalities relating to the registration of provisions, translation, and reproduction rights. The Protocol, now part of the convention appendix, was renamed the Special Provisions Regarding Developing Countries, but it was still an integral part of the consequential BC articles. Since the ratification experience had been so unfruitful in the recent past, the Paris act would become effective after only five governments had ratified it. Additionally, in light of their countries’ status in international publishing, the governments of Great Britain, Spain, France, and the United States would also have to ratify the Paris version of the UCC in order to make both conventions legally binding in their 1971 form. Linking the two conventions in this way was seen as strengthening their status in international law. The most important changes to the substance of the Protocol were the limitation of translation and reproduction rights and their substitution by a complex license system, which involved the implementation of compulsory licenses for a developing country in cases where there was no other feasible means of obtaining the respective material. In such cases, provisions for translations were limited to being “only for the purpose of teaching, scholarship or research,” removing use for the “promotion of culture.” Reproduction rights also disregarded research and culture accordingly, only allowing applications “in connection with systematic instructional activities.”⁴⁷ Under pressure from France and Great Britain, objections to this modification were adjudged “unacceptable” and even to represent a “fundamental change” in the notion to grant provisions

⁴⁷ WIPO: Records of the Diplomatic Conference for the Revision of the Berne Convention, Paris July 5 to 24, 1971 (Geneva, 1974): 205–7.

for “development” and “modernization” needs.⁴⁸ The Berne Safeguard Clause was, in effect, disabled under pressure from Asian and African countries as it now excluded all developing countries from its regulations. This enabled those within the BC to join the UCC, which, of course, had lower protection standards, while the BC was forced to make itself more attractive to a wide range of national governments in order to secure their accession.

What many contemporaries perceived to be a “crisis,” or “copycatastrophe” as one critic creatively put it,⁴⁹ was considered to be “more or less concluded”⁵⁰ by the time the Paris revision conference of the BC and UCC came to a close. First, the ratifications came much more numerous and much more quickly than after the previous revision conference, and second, the majority of the developing countries that had already been members of the BC, remained so.⁵¹ One event shortly after Paris 1971 gives the impression that the compromises arrived at were satisfying enough to guarantee provisions for developing countries in the field of international copyright. In 1973, Nigeria hosted the International Conference on Publishing and Book Development for African countries at which the implementation of the revised BC and its appendix granting provisions to developing countries was highly recommended. The final report of that conference stated:

The fact that some countries might not be able to implement these terms immediately should not prohibit them from ratifying the revised conventions. There was also general consensus among conference delegates that ignoring copyright-conventions for short-term gains would not benefit the long-term development of the African publishing industry.⁵²

⁴⁸ Ibid., 148.

⁴⁹ R. F. Whale, *Comment on Copyright* (London: British Copyright Council, 1969), 5.

⁵⁰ Adolf Dietz, *Urheberrecht und Entwicklungsländer. Urheberrechtliche Probleme bei der Errichtung einer neuen internationalen Wirtschaftsordnung* (Munich: C. H. Beck, 1981), unpaginated foreword.

⁵¹ Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works*, 662.

⁵² E. Oluwasanmani, E. McLean, and H. Zell, eds., *Publishing in Africa in the Seventies: Proceedings of an International Conference in Publishing Development Held at the University of Ife, Ile-Ife, Nigeria, 16–20 December 1973* (Ibadan: University of Ife Press, 1975), 15.

In fact, only very few countries have actually made use of the specified provisions by registering with WIPO.⁵³ The long-term impact of the 1967 and 1971 negotiations are still not known at this point. However, subsequent analysis of international copyright regimes and developing countries would be beneficial in order to place the events of the 1960s in a wider context.

Conclusion

During the 1960s, international copyright regimes became increasingly complex and multifunctional. The debates, which reached their peaks between the revision conferences of 1967 and 1971, highlight the significance of new stakeholders in the international arena. Stakeholders in the process were newly independent countries, mostly from Asia and Africa; private interest groups that became increasingly more institutionalized and transnationally organized; and IGOs such as WIPO or UNESCO, which pursued their own set of interests using strategies such as agenda setting. Conventional revisions of the established international control mechanisms, such as the BC had, in the past, focused merely on administrative and technical issues, but with the appearance of new stakeholders, a consistent increase in numbers and the emergence of new issues, copyright systems became more closely intertwined with established political fields. International economy, development, modernization, and diplomacy formed a nexus, at least during the 1960s, that brought a new quality to the way international copyright was perceived and negotiated.

The BC founders' late-nineteenth-century dream of a teleological "evolution" of international copyright into a globally harmonized "world law" was fundamentally shaken in the 1950s and 1960s. With the establishment of a second convention, the UCC, seeking to gain worldwide status and guaranteeing copyright protection to all nations, the national and private interests of so-called cultural exporters were on a head-on collision course with each other and with those who hoped for "modernization"

⁵³ All notifications and ratifications to the BC can be obtained from WIPO listings: http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&search_what=N&treaty_id=15.

and “development” by using “advanced” knowledge. The underlying issue of global knowledge ownership determined all discussions during that period. Knowledge in this case was regarded as a tradable and therefore a negotiable resource. However, since copyrights and authors’ rights regulate immaterial cultural goods, the debates soon became distorted as they did not evolve around something that only one particular societal group exclusively “owned.”

The internationalization of copyrights and authors’ rights in the 1960s and their subsequent availability to a great number of new regions worldwide transformed the understanding of the “public sphere.” Copyright laws, continuously defining the balance between public and private interests, had exclusively been national laws that increasingly interacted with those of other countries but never formally merged: the BC and UCC merely coordinated these laws with each other without directly influencing national legislative processes. In the 1960s, those national regulations faced unprecedented challenges. However, since most developing countries never questioned nationally organized copyright laws as a concept, but only questioned the political and economic conditions these laws operated within, the position of the European institutions and their invention of copyrights and authors’ rights was sustained up until the 1970s, as was, consequently, the nation-state as such. However, as those developing countries became increasingly moralized and politicized, copyrights and authors’ rights shifted from being purely administrative and technical instruments to becoming complex vehicles binding a wide set of stakeholders to each other. In the long run, the revision conferences of 1967 and 1971 may seem to have been a minor episode, but they illustrate the impossibility of drawing straightforward lines of “expansion” or “evolution” in the field of copyrights and authors’ rights.

Legal Designs: Danish Designers as Court-Appointed Experts and the Expansion of the Concept of Copyright

STINA TEILMANN-LOCK

In the three centuries that have passed since its introduction by the British Statute of Anne in 1710,¹ copyright law has been transformed from a narrow law regulating only the printing of books to a modern wide-ranging law that protects intangible property rights in the works of sculptors, jewelers, photographers, architects, cabinetmakers, software developers and numerous other types of people who are recognized to be creative. It has been acknowledged that their products or artifacts contain an intangible dimension that is protectable by copyright law.

An example of the expansion of this subject matter occurred in the early twentieth century in Danish copyright law when design became an object of copyright protection in Denmark. Recently, Danish lawyers have commented on the fact that, in copyright infringement cases involving applied art, Danish courts tend to accord an unimpeachable authority to the views of court-appointed experts.² Yet few have sufficiently recognized quite how important and influential these court-appointed experts have been. Strategically, they have been given the authority to inform judges and lawyers, and society at large, about both the principles of modernist aesthetics in design and the working practices of designers. It will be argued in this chapter that court-appointed experts, in particular experts

¹ (1709) Anne c. 19 (The Statute of Anne). The statute provided for “a sole Right and Liberty of Printing such Book and Books for the Term of One and Twenty Years” to stationers who had already had privileges in existing published works. Moreover, fourteen years of copyright protection was offered to “the Author of Any Book or Books already Composed and not Printed and Published, or that shall hereafter be Composed, and his Assignee, or Assigns.” If the author was still alive after the fourteen-year term, a renewal was possible for a second period of fourteen years. For more on early British copyright, see Ronan Deazley, *On the Origin of the Right to Copy* (Oxford: Hart Publishing, 2004).

² Morten Rosenmeier, “Lawyers and Experts in Danish Copyright Infringement,” in *Art and Law: The Copyright Debate*, ed. M. Rosenmeier and S. Teilmann (Copenhagen: Djoef Publishing, 2005), 75–83.

recruited from the circle of “Danish Modern” designers, have had a crucial impact on the direction of design copyright in Denmark—both on the scope of copyright protection of applied art, and on the very notion of “design” which deserves such protection. Three landmark cases from Danish law concerning copyright infringement in designs will be discussed, tracing a path from expert opinion statements to statutory law.

The Use of Court-Appointed Experts

The practice of appointing experts in copyright infringement cases (and in other legal disputes) is common in many national legislations today. In Denmark, the particular rules are formulated in the Administration of Justice Act,³ which goes back to 1916, although the practice can be traced back several hundred years.⁴ Different countries have different traditions and processes for appointing experts. In the US, for example, it is common that the parties to a case appoint their own experts to give testimony. Court-appointed experts are, as the name indicates, assigned by the court itself to provide it with the objective views and evaluation of an expert in the subject matter of the dispute. In Denmark, appointments take place at the request of any of the parties to the case, and one or more experts may be appointed.⁵ In practice, the parties themselves often agree to propose a specific expert. If the parties cannot agree the court either elect one or ask a relevant professional association to provide one with the appropriate expertise.⁶ Typically, experts’ accounts are presented as written statements to the court; cross-examinations may also take place in court. The remuneration of experts is determined by the court.

³The Danish Administration of Justice Act, Consolidated Act No. 809 of the Danish Ministry of Justice (14 September 2001), Chapter 19.

⁴Possibly to Danske Lov of 1683.

⁵The Danish Administration of Justice Act, § 196 (1).

⁶In design infringement case today, the professional organization Danske Designere (Danish Designers) is frequently consulted in order to identify suitable experts.

Applied Art as an Object of Copyright

In Denmark, applied art seems to have been first introduced as an object of copyright by the 1902 Act on Authorial and Artistic Rights. An earlier law of 1864—granting a ten-year exclusive right to the originator of works to be used as prototypes in the production and decoration of articles for everyday use—had been allowed to lapse.⁷ The 1864 law had allegedly lapsed because such works would now fall under copyright law. However, the 1902 act failed to live up to this implicit intention, as demonstrated by a Supreme Court decision of 1907. The decision concerned a blue-fluted china coffee pot designed by Arnold Krog (1856–1931), who was one of the most important designers in the history of The Danish Royal Porcelain Factory (today: Royal Copenhagen) (see figure 4.1).⁸



FIGURE 4.1.

*Blue fluted china coffee pot
by Arnold Krog.*

⁷ Lov om Eftergørelse af Kunstarbejder, 31 March 1864.

⁸ For further discussion of this case, see Stina Teilmann-Lock, “What Is Worth Copying Is Worth Protecting: Danish Modern and the Shaping of Danish Copyright Law,” in *Scandinavian Design: Alternative Histories*, ed. Kjetil Fallan (Oxford: Berg Publishers, 2012), 35–48.

According to the ruling of the Supreme Court, Krog's coffee pot did not qualify for copyright protection:

The plaintiff's pot, according to its description as ordinary industrial ware, the foremost purpose of which is practical usage, cannot be considered a work of art in the sense wherein this expression is used in the Act of 19 December 1902 § 24.⁹

The fact that the coffee pot had a practical use was deemed to disqualify it from copyright protection. If this were to set a precedent, all applied art would routinely be excluded. However, the Danish parliament reacted promptly.¹⁰ An amendment to the act was made, stating that:

According to this act, original artistic works intended to be prototypes for industrial art and handicrafts, as well as the objects created on the basis of such works, are to be considered works of art whether or not these are produced individually or in a larger quantity. The right according to this act is valid for any type of reproduction, when it requires mediating artistic work as well as when the reproduction takes place by purely mechanical or chemical means, and whether or not the reproduction takes place with a purely artistic purpose or with an industrial purpose or to serve a practical use.¹¹

Thus it was written into the Danish Act on Authorial and Artistic Rights that even if a work was made for practical use, this should not in itself

⁹ U.1907.619, 621.

¹⁰ The Supreme Court, in fact, had included the following unambiguous message to the Danish parliament in the judgment: "There being no explicit provision in the act of 19 December 1902, there are no grounds for classifying industrial goods within its framework, their production—as is the case with the coffee pot that this lawsuit concerns—being undertaken, with however much artistry, for practical use and with the aim of mass production." U.07.619, 621.

¹¹ Lov om ændret Affattelse af § 24 i Lov om Forfatterret og Kunstnerret (Amendment of 28 February 1908). The text of § 24 of the 1902 Act on Authorial and Artistic Rights (as amended in 1904), which was being replaced, had had the following wording: "An artist has, according to the restrictions of this act, the sole right to publish or sell or let be published or put up for sale reproductions of his original work of art or of parts of it. This is so when the reproduction requires mediating artistic work as well as when the reproduction takes place by purely mechanical or chemical means."

exclude it from copyright protection. Even so, the fact that function is a defining feature of a work of applied art continued to make courts hostile to the idea of extending copyright protection to applied art. And it was precisely by reconciling the functional and the nonfunctional—or the applied arts and the fine arts—that court-appointed experts wielded immense influence over the direction and expansion of Danish copyright law in the twentieth century.

The Influence of Design Experts

This reconciliation was achieved when the Danish Copyright Act of 1961 specifically defined “applied art” (*brugskunst*) as an object of protection.¹² To get to this point the circle of “Danish Modern” designers had been working scrupulously and insistently for decades in order to explain to the legal establishment what was to be understood by “applied art.”¹³ In particular they had introduced a way of viewing a work of applied art as a synthesis of function and aesthetics. Importantly, they had familiarized courts with the artistic idiom of functionalism, which categorically denies any distinction between form and function, famously in slogans such as “form follows function.”¹⁴

¹² Lov om ophavsretten til litterære og kunstneriske værker (31 May 1961) § 1. The Danish term “*brugskunst*” is modeled on the German “*Gebrauchskunst*.”

¹³ Applied art had been introduced as a potential object of protection in the Berlin Revision of the Berne Convention (1908). However, the Berne Convention had left it up to individual national legislations to decide on the extent of copyright protection of design. Cf. Article 2(7): “Subject to the provisions of Article 7(4) of this Convention, it shall be a matter for legislation in the countries of the [Berne] Union to determine the extent of the application of their laws to works of applied art and industrial designs and models, as well as the conditions under which such works, designs and models shall be protected. Works protected in the country of origin solely as designs and models shall be entitled in another country of the [Berne] Union only to such special protection as is granted in that country to designs and models; however, if no such special protection is granted in that country, such works shall be protected as artistic works.”

¹⁴ The saying originates from an article by the architect Louis Sullivan: “It is the pervading law of all things organic, and inorganic, of all things physical and metaphysical, of all things human and all things super-human, of all true manifestations of the head, of the heart, of the soul, that the life is recognizable in its expression, that *form ever follows function*. This is the law.” Louis Sullivan, “The Tall Office Building Artistically Considered,” *Lippincott’s Magazine* 57 (1896): 403–9.

In 1908 (as discussed above) Danish statutory law began to offer protection to works “intended to be prototypes for industrial art and handicrafts” and made “with an industrial purpose or to serve a practical use.” Yet this should not be taken in itself to imply that the status of applied art under copyright law would be secured. As the historical development in United States copyright law serves to illustrate, a different route might well have been taken had it not been for the lessons in functionalism supplied by design experts in Denmark. The United States Copyright Act of 1909 had introduced “works of art models or designs for works of art”¹⁵ as a type of subject matter. Initially, works of industrial art with utilitarian purpose were banned from copyright protections. However, a regulation of 1917 stipulated that, if copyright had been registered in artistic drawings, these may “afterwards be utilized for articles of manufacture.”¹⁶ Accordingly, it became possible to register copyright in works of applied art. Later United States copyright law adopted the term “works of artistic craftsmanship” to further ensure that what might rightly be considered a “work of art” under copyright law should be recognized as such even if the work might also serve a useful purpose.¹⁷

However, the direction taken in United States law has been significantly different from that of Danish copyright law. A number of decisions by United States courts—in which the question of copyrightability of applied art remained unresolved—led to the adding of the “useful article doctrine” to the Copyright Act of 1976.¹⁸ Thus, today, under US copyright law, applied art falls under the “useful article doctrine,” which denies copyright protection to any utilitarian element of a design. In the definition of pictorial, graphic, and sculptural works in the 1976 act, which includes works of “applied art,” it is specified that,

¹⁵ Copyright Act of 1909, Pub. L. 60-349, 35 Stat. 1075, Sec. 5 (g). The 1909 act repealed the Copyright Act of 1870, which had limited protection to “a painting, drawing, chromo, statue, statuette, and of models or designs intended to be perfected as works of the fine arts.” § 86, Copyright Act of 1870, 16 Stat. 198, in *Primary Sources on Copyright (1450–1900)*, ed. Lionel Bently and Martin Kretschmer, www.copyrighthistory.org.

¹⁶ Copyright Office, *Rules and Regulations for the Registration of Claims to Copyright*, Bulletin no. 15 (1910), cited in Richard P. Sybert and L. J. Hulley, “Copyright Protection for ‘Useful Articles,’” *Journal of the Copyright Society of the U.S.A.* 54, no. 2–3 (2007): 422. See this article for a discussion of the history of copyright protection for applied art in the United States as well.

¹⁷ See Sybert and Hulley, “Copyright Protection for ‘Useful Articles,’” 422.

¹⁸ See the discussion of the cases in *ibid.*

Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.¹⁹

Insofar as a work has a “practical use” (which, by definition, is always the case in a work of applied art) it will be denied copyright protection unless the artistic expression of the work can be extracted and identified as an independent artwork. In other words applied art (in particular applied art with a modernist artistic idiom) is barred from copyright protection in the United States. In a nutshell, this was the situation in Denmark in the early twentieth century. However, court-appointed “design experts” made sure that it did not remain that way.

After the introduction of the 1908 amendment to Danish copyright law, a number of cases that concerned applied art were heard by various courts. In some cases²⁰ works of applied art were found to be copyrightable: silver jewelry,²¹ a lamp shade designed by the Danish functionalist Poul Henningsen (1894–1967)²² and, indeed, Arnold Krog’s coffee pot along

¹⁹ 17 United States Code title § 101, definitions. The whole text states that: “Pictorial, graphic, and sculptural works’ include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.”

²⁰ Note however: U.1924.251H concerning a bottle opener shaped as a sea horse. On this case, see the Danish Arts & Crafts Association report *Kunstnerret: Kunsthåndværk og Kunstindustri* (Copenhagen: G. E. C. Gads Forlag, 1943).

²¹ U.1913.760.

²² U.1930.376Ø. Poul Henningsen was a prominent architect, designer, script writer, art critic, and social reformer in Denmark in the mid-twentieth century. As a designer he had won great acclaim for his multishade glare-free lighting system at the International Exhibition of Modern Decorative and Industrial Arts held in Paris in 1925. He later developed a series of lamps on the basis of his glare-free lighting system. The lamps (for example, PH5, the Artichoke

with other pieces from his blue fluted tea and coffee set. In 1926, the Royal Porcelain Factory once again sued a market rival for copyright infringement, and this time it won the case.²³ However, court members continued to put up remarkable resistance to the new type of subject matter of copyright law. For instance, in the Arnold Krog case in 1926, the Supreme Court voted only narrowly in favor of copyright protection for the pot, with five votes in favor and four votes against.²⁴

In 1935 two experts of modern design were faced with a critical challenge. What have since become icons of modernist design—Thonet-Mundus’s tubular steel furniture, including Mart Stam’s S 33 chair and Marcel Breuer’s chairs B 32 and B 64 (now renamed as S 32 and S 64) (see figure 4.2)—was the object of a copyright dispute that was eventually taken to the Danish Supreme Court.²⁵



FIGURE 4.2.
Marcel Breuer's chair
S 32 (1929/30).

Lamp and the Cone Lamp) are still produced by Louis Poulsen A/S and their huge popularity in Denmark has remained undiminished since the 1920s. See <http://www.louispoulsen.com>.

²³ U.1926.251H.

²⁴ See Per Håkon Schmidt, *Teknologi og Immaterialret* (Copenhagen: GAD, 1989), 58.

²⁵ For a discussion of litigation over the same chairs in Germany, see Otakar Máčel, “Avant-garde Design and the Law: Litigation over the Cantilever Chair,” *Journal of Design History* 3, no. 2–3 (1990): 125–43.

The design experts—one of them, Kay Fisker (1893–1965), a professor at the School of Architecture at the Danish Academy of Art and a key figure of Danish modernist architecture²⁶—presented their view of applied art to the court:

Nowadays the artistic task in designing an article of everyday use such as a steel chair consists in giving it as simple a shape as possible; taking into consideration, on the one hand, the material and its technical utilization and, on the other hand, the most functional shaping of the article. By contrast, the conception of art of former days consisted in putting the chief emphasis on the ornamentation of the article whereby a large amount of slackness and crudity could be concealed. The chairs from the Thonet-Mundus factory possess by dint of their elegant and seemingly matter-of-course simple lines and the practical positioning of the seat, back, arm rest and so forth precisely such qualities [of functional shaping] and ought therefore to be regarded as works of art as defined by the law.²⁷

Fisker summarized the modernist notion of successful design as something which unites its aesthetic and the utilitarian purpose, as something whose artistic originality is not merely ornamental. As such, Fisker stresses the artistic idiom, the elegance and the simple lines of Breuer's works as the fulfillment of modern aesthetic ideals. The first court ruled to affirm this modernist view of the aesthetics of applied art.²⁸ The Supreme Court, however, took a different stance on chair design:

[T]he pieces of furniture presented by plaintiff were all very simple models and the shapes that they had been given were naturally and technically motivated by the material and their intended use. The attractive form which has resulted does not imply such artistic characteristics that render the furniture as works of industrial art according to § 24, article 3 of the Act on Artistic and Literary Rights.²⁹

²⁶ Kay Fisker is known for a series of prominent apartment blocks in central Copenhagen, including "Dronningegården" (1942–43) and "Vestersøhus" (1935) as well as Aarhus University (1932–43).

²⁷ U.1935. 695, 697.

²⁸ Similarly in U.1930.376Ø.

²⁹ U.1935. 695, 698.

According to the ruling, the aesthetic appeal of the furniture was not considered to be the result of artistic endeavor. Courts had not yet acknowledged the lessons of the functionalists and the Supreme Court in particular remained hesitant. This situation remained for decades to come.³⁰ However, the introduction of the 1961 Copyright Act indicated that a significant change had taken place. “Applied art” was defined as an object of copyright protection. Crucially, the Danish Arts and Crafts Association had ensured that the 1961 act would contain a specific formulation determining whether an article of everyday use was to be subject to protection under copyright law. A white paper dated 27 April 1961 declared, wholly in accordance with a modernist or “functionalist” aesthetics of design, that

emphasis ought to be placed on whether the article is an artistic creation which fulfills the usual requirements for a work as defined by the law. In that case it ought to be protected without taking into account its practical purpose, even when the consideration of the functionally appropriate design played a decisive role in the shaping of the article.³¹

By 1961 the modernist aesthetic ideal of a synthesis between form and function had been heeded. A work of applied art was to be viewed purely in terms of the originality of its artistic expression regardless of its utility. From that time, in line with this turn in copyright law, Danish courts more or less have granted copyright protection when experts consider that a work of applied art is “original.” Thus, for example, a set of saucepans, a drinking bowl for dogs, a coffee mill and a washing-up brush have all been found to qualify for copyright protection, in each case, on the basis of experts’ opinions.

³⁰ See, for example, U.1954.170Ø and U.1956.237/2H.

³¹ “Betænkning om lovforslag om ophavsretten til litterære og kunstneriske værker m.m.,” *Folketingstidende* 1960–61, Tillæg B, Sp. 628f.

The Tripp Trapp Case

A remarkable test of the power of modernist aesthetics in the court room took place in 2001. This concerned the so-called Tripp Trapp adjustable wooden high chair for children, designed by Peter Opsvik and first marketed in 1972 (see figure 4.3).³² Importantly, the chair's construction had been protected by a patent from 1974 until the patent expired in 1994 (twenty years is the maximum term of patent protection in all countries). After the patent lapsed, the designer would have to rely on copyright protection to secure his exclusive right to the characteristic design of the chair.³³

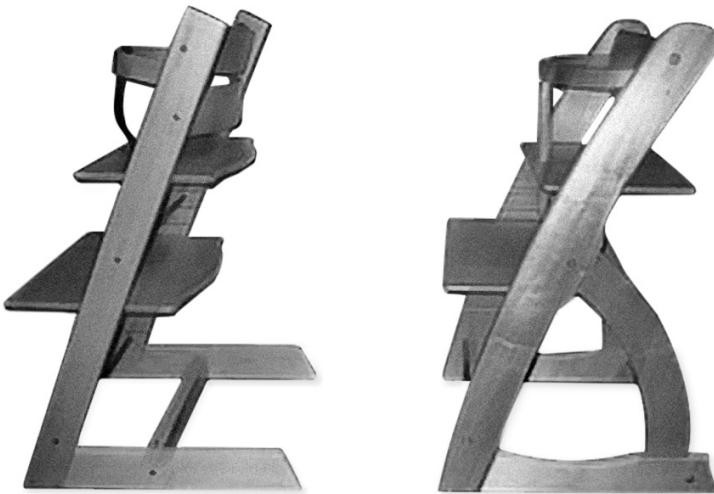


FIGURE 4.3. *Tripp Trapp high chair (left) designed by Peter Opsvik and the 2-step chair (right) produced by the Tvilum Møbelfabrik.*

³² See further discussion of the case in Stina Teilmann-Lock, “‘Much More Than a Highchair’”: A Cultural-Legal Case Study of the Tripp Trapp Chair,” in *FLUX: Research at the Danish Design School*, ed. Anne Louise Sommer et al. (Copenhagen: The Danish Design School Press, 2009), 142–49.

³³ Copyright infringement cases concerning the Tripp Trapp have also been heard in Germany and Norway.

In the 1990s a rival furniture maker marketed its “2-step chair,” a chair resembling the Tripp Trapp. Peter Opsvik and Stokke, the manufacturer of the Tripp Trapp, sued the furniture maker, Tvilum Møbelfabrik, for damages. The case, *Peter Opsvik and Stokke Fabrikker v. Tvilum Møbelfabrik*,³⁴ was first heard by the High Court of Western Denmark. According to the plaintiff, the design of the 2-step chair infringed copyright. To be sure, the appearance of the 2-step chair was rather similar to that of the Tripp Trapp, except for few deviations including a curved stiffening piece, which did not have any counterpart on the Tripp Trapp, as well as a number of curved sides and cross pieces where those of the Tripp Trapp were straight. Yet some degree of similarity between the chairs was inevitable simply because the 2-step chair was based, quite legally, on the constructive principle of the Tripp Trapp, whose patent had lapsed.

Three experts were appointed by the court to evaluate the differences between the two chairs. The most prominent of the experts was the renowned furniture designer Rud Thygesen, who is himself the creator of a series of classic Danish Modern pieces, many of which are exhibited in design museums around the world.³⁵

The decisive question was whether it would be possible for anyone to make use of the Tripp Trapp construction (which after the lapse of the patent was freely available) without simultaneously replicating and thus infringing the copyrighted design of the Tripp Trapp. The experts observed that the design of the Tripp Trapp was very closely tied to its purpose. They argued that the design of the chair was “conditioned by its technical function.”³⁶ Yet this “technical function” had been protected only by a patent. (It is remarkable, in the 1970s, a decade after the 1961 act, that the Tripp Trapp’s producers still considered patent protection to be more appropriate than copyright protection. Patents must be applied for and the registration process is usually long and costly, whereas copyright protection comes without formalities.) The old arguments were rehearsed and the courts (which seemed to ignore the 1961 act) attempted to make a

³⁴ U.2001.747H.

³⁵ Rud Thygesen, in collaboration with the designer Johnny Sørensen, is the originator of a large number of wooden chairs and tables, some of which can be found in the collections of MOMA in New York and the Victoria and Albert Museum in London.

³⁶ “Betænkning om lovforslag om ophavsretten til litterære og kunstneriske værker m.m.,” 751.

conceptual distinction between those aspects of the chair that belonged to its aesthetic quality and those that belonged to its purely “technical functionality.” As one would anticipate, this argument was entirely unacceptable to the experts. They argued that, in such a simple design as that of the Tripp Trapp, function and form were in effect indistinguishable, and that “no further designerly components could be found in the chair other than those dictated by function.”³⁷

On the basis of the experts’ report, the High Court decided that the Tripp Trapp was indeed an original work and thus deserved protection under copyright. However, they declared that the 2-step chair did not infringe the copyright of the Tripp Trapp. The court held that, since both chairs were constructed according to the same technical principles, there would inevitably be a limited range of variations possible in their design and that considerable similarity was unavoidable.

The plaintiff (the manufacturer and designer of Tripp Trapp) appealed and the Supreme Court of Denmark overruled the decision. While affirming that the Tripp Trapp was a copyrightable work, it also found that there had in fact been infringement. The Supreme Court claimed that what mattered was simply the fact that the 2-step chair *copied* the Tripp Trapp. Rather than basing its ruling on any positive properties of similarity or deviance, it was the causal relation between the two chairs that was deemed to be incriminating. Summing up the view of the experts, the Supreme Court declared that “the Tripp Trapp possesses a pioneering design, while the 2-step chair has been generated by copying, without any independent skill or effort.”³⁸

Conclusion

The Tripp Trapp ruling was the culmination of a century of modernist design aesthetics promoted in “experts opinions” in Danish courts. Practical use was once enough to exclude works of applied art from copyright protection outright; today the Supreme Court accepts that function

³⁷ Ibid.

³⁸ Ibid., 758.

and form in a chair may be indistinguishable. Copyright is allowed to expand accordingly. Yet the law has not arrived at this conclusion by making observations and judgments from a position of detachment and sovereignty. Rather, judges have had to listen patiently while experts have explained both the aesthetic and technical principles of modern design—and insisted on their indivisibility in this particular epoch.

It is to be expected that if designers are allowed a say as to whether design is to be protected by copyright, their answer will be in the affirmative. To be sure, as has been argued in this chapter, the Danish systematic use of designers as court-appointed experts in copyright infringement cases has expanded copyright considerably in the realm of design. However, as one commentator has pointed out, the “grant of copyright protection itself is not, and should not be viewed by artists, artisans, designers, or manufacturers, as a governmental statement of artistic merit or legitimacy.”³⁹ There is no doubt that the quest for artistic recognition has guided the argumentation of the Danish design experts. At present, this pursuit has been carried across to the United Kingdom where the repeal of Section 52 of the Copyright, Designs and Patents Act 1988 carries the intention to make the term of protection of designs as long as the term of protection of fine art.⁴⁰ To a large extent, the drive for the extension came from Danish (and Italian) design manufacturers, who were campaigning for such an equal status for design—and designers—under copyright law.⁴¹ However, the desirability of importing the Danish approach to the United Kingdom is debatable. The difficulty with copyright protection of design is its potential for restricting the making of fair followers: in Denmark this problem has been resolved by narrowing the scope of protection. If an equivalent measure cannot be found in the case of UK law, design protection may in fact come to work to the disadvantage of designers by stifling new work.

³⁹ Barbara Lauriat, “Copyright for Art’s Sake?,” *European Intellectual Property Review* 36, no. 5 (2014): 275.

⁴⁰ Enterprise and Regulatory Reform Act 2013 c. 24, <http://www.legislation.gov.uk/ukpga/2013/24/enacted>

⁴¹ “Copyright Protection for Designs: Impact Assessment,” 15 May 2012, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31970/12-866-copyright-protection-designs-impact-assessment.pdf.

4

Intellectual Property and Competition Policy: Patent Pooling and Industrial Concentration in Germany (1890–1930)

LOUIS PAHLOW

Introduction

In nineteenth-century Germany, prior to any consistent protection for inventions, a fierce debate surrounded how best to balance such protection with newly won economic freedoms. Opponents of a state-administered patent law saw it as the granting of a legal monopoly, which would be in direct conflict with the freedom of competition, as a product of those wider economic freedoms.¹ Similar discussions with similar arguments were also taking place in other countries. With the introduction of the German Patent Act (Reichspatentgesetz) in 1877 the matter seemed to have been decided in favor of the supporters of patents, but the fundamental conflict between intellectual property and freedom of competition remained. A great deal is still unknown, from a legal history perspective, about the effects of patents on the behavior of patent holders in their relationships with their competitors.

Patents as a special kind of a property-based relationship between individual inventors, commercialized applicants and industrial users are an indispensable instrument for the growth and success of industrialized business. They institutionalize the cooperation, communication, and competition among industrial business players such as entrepreneurs and workers, owners and nonowners, producers and users. Patent regimes characterize patents as a transferrable and a licensable good; in

¹ Louis Pahlow, “Monopole oder freier Wettbewerb? Die Bedeutung des ‘Licenzzwangs’ für die Reichspatentgesetzgebung 1876/1877,” in *Die zeitliche Dimension des Rechts. Historische Rechtsforschung und geschichtliche Rechtswissenschaft*, ed. Louis Pahlow (Paderborn: Schöningh, 2005), 243ff.

the beginning of the twentieth century and during the interwar period this conception created a strong preference for joint ventures and industrial collaborations. As a result, patents became an instrument for the concentration of patent-based industries, leading to an expansion of the protection of patents, which in turn posed a particular challenge for the competition regimes.

In fact, in the history of patent law, investigations into the development and protection of the individual inventor's legal position took prominence.² Reducing the legal history to the protection and implementation of individual inventors' rights, however, runs the risk of obscuring the changes in overall economic conditions after 1900, influencing the law around it including the development of patent regimes. The 1920s and 1930s were not only characterized by significant upheaval and crisis, but also by a progressive concentration of enterprises. This process was supported by the combination of technical resources and their subsequent partitioning, a situation which, certainly from a legal perspective, was a direct consequence of patent law, which was itself also influenced in turn. Within the framework of industrial agreements technical property rights were increasingly implemented after 1900 in cases of consolidation and cartelization. The exchange of inventions was used as the foundation for international corporate links and to specifically exclude or include outsiders from access to technical knowledge. After 1918 related legal questions arose with increasing frequency in the case law of state courts and authorities, although due to the number of existing arbitration clauses, a much higher number of arbitration proceedings can be assumed.³

² Alexander K. Schmidt, *Erfinderprinzip und Erfinderpersönlichkeit im deutschen Patentrecht von 1877 bis 1936* (Tübingen: Mohr Siebeck, 2009); Margrit Seckelmann, "Der Dienst am schöpferischen Ingenium der Nation. Die Entwicklung des Patentrechts im Nationalsozialismus," in *Wirtschaftssteuerung durch Recht im Nationalsozialismus. Studien zur Entwicklung des Wirtschaftsrechts im Interventionsstaat des "Dritten Reiches"*, ed. J. Bähr and R. Banken (Frankfurt a.M.: Klostermann, 2006), 237ff.; Margrit Seckelmann, *Industrialisierung, Internationalisierung und Patentrecht im Deutschen Reich 1871–1914* (Frankfurt a.M.: Klostermann, 2006), in particular 325ff.; Kees Gispens, "Patentrecht und Schutz des geistigen Eigentums," in *Wirtschaftskontrolle und Recht in der nationalsozialistischen Diktatur*, ed. Dieter Gosewinkel (Frankfurt a.M.: Klostermann, 2005), 267ff.

³ Horst Wagenführ, *Deutsche, Ausländische und Internationale Kartellverträge im Wortlaut* (Nürnberg: Palm & Enke, 1931), 28, 43, 47, 53, 74, 82, 86, 95; Justus Wilhelm Hedemann, *Reichsgericht und Wirtschaftsrecht. Ein Bild deutscher Praxis* (Jena: G. Fischer, 1929), 53f.

The difficulties lay in a larger argument surrounding the advantages and disadvantages of domestic and international cartel movements, in which some saw a contribution to economic settlements and peace but others saw as the reasons behind rising prices and the abuse of economic positions of power.⁴ It is clear that political and economic arguments were therefore mingled with legal discussions at that time.

This chapter will use the example of patent law to examine the question of how intellectual property rights affect the competition and interdependence between market participants, and their regulation. The first section will analyze the significance of patent pools as the basis for a bundling of technical property rights as well as the expansion of the patents' penetrative power in the face of outsiders. The subsequent section will then address the issue of whether, and if so to what extent, patent, and cartel laws after 1918 were able to restrict the increasing market power of industrial concerns with regards to the access of outsiders to technical innovations.

Patents as Instruments of Industrial Concentration

Patents are subjective civil rights through which the patent holder, who is not necessarily the inventor, can prevent others from using the invention. In order to minimize their impact, the German Patent Act of 1877 introduced not only a "requirement to obtain a license" in the public interest, but also declared the patent in Section 4 of the German Patent Act as a marketable commodity. As such the patent was conceived from the start as a right of exploitation for the patent holder, who could, against remuneration, cede the use of the invention to others by means of assignments and licensing agreements.⁵ The revised patent law of 1891 adopted these instruments; in 1911 the legislative body replaced the "requirement to

⁴These opposing positions became clear at the world economic conference held by the League of Nations in Geneva in May 1927, at which the issue of international cartels and the necessary steps were discussed. See Louis Pahlow, "Internationales Kartellrecht und europäische Wirtschaftspolitik in der Zwischenkriegszeit," in *Festschrift für Jan Schröder*, ed. A. Kiehnlé, B. Mertens, and G. Schiemann (Tübingen: Mohr Siebeck, 2013), 725–41.

⁵Pahlow, "Monopole oder freier Wettbewerb?," 243ff.; idem, *Lizenz und Lizenzvertrag im Recht des Geistigen Eigentums* (Tübingen: Mohr Siebeck, 2006), 16ff.

obtain a license” with the introduction of a compulsory license, thus the German Patent Office enabled others to participate in the patent, so long as the “public interest” could be affirmed.⁶

Especially toward the end of the nineteenth century it was predominantly industrial concerns that registered the inventions of their employees as patents and carried the costs. Innovative companies took advantage of the marketability of their patents early on in order to obtain access to external technologies in exchange for licensing agreements or to secure the transfer of their own patents in order to profit from the inventions of others. At the beginning of the twentieth century the focus was no longer on bilateral agreements. There was increasing evidence of patent pools, in which several companies pooled their technical innovations to form broad royalty-collecting agencies.

The aim of patent pools was to combine similar or related inventions and to offer the possibility of mutual access from which the majority of the companies in the pool would profit. The significance of these patent pools, both for patent law and for industrial concentration and mergers, can be seen in the contemporary literature of the interwar period.⁷ Company manifestations and their legal constructions were discussed and debated from the standpoint of patent law as well as company and cartel law. In the first half of the twentieth century there were three distinctly different models of patent pools: *First*, two or more companies could grant mutual

⁶“Law Affecting Compulsory Patent Licences from 6.6.1911,” *Reichsgesetz-Blatt (RGBl)* (1911), 243ff.

⁷ See, e.g., Rudolf Alexander, “Gesellschaften zur Erfindungsverwertung,” *Zeitschrift für das gesamte Handels- und Konkursrecht* 99 (1934): 329ff., especially 357ff.; Hermann Isay, *Die Patentgemeinschaft im Dienst des Kartellgedankens* (Mannheim: Bensheimer, 1923); idem, “Fragen der gemeinsamen Ausbeutung von Erfindungen,” *Gewerblicher Rechtsschutz und Urheberrecht* (1925): 171f.; Friedrich Neumeyer, *Patentgemeinschaften und deren Aufbau bei amerikanischen Industrieverbänden* (Marburg: Elwert'sche Verlagsbuchhandlung, 1932); Erwin Salzer, *Austausch von technischen Erfahrungen und Erfindungen im Rahmen von Unternehmerverbänden* (Darmstadt: 1927); Richard Passow, *Betrieb, Unternehmung, Konzern* (Jena: G. Fischer, 1925), 100ff., 117ff.; Richard Rosendorff, *Die rechtliche Organisation der Konzerne* (Berlin: Spaeth & Linde, 1927), 31; Georg Respondek, “Arbeitsgemeinschaften und Fragen des Patentrechts bei der internationalen Kartellierung der Industrie,” *Kartell-Rundschau* (1927): 319ff.; Carl Schramm, *Handbuch für Kartell- und Fachgruppen-Leitungen* (Berlin: Schweitzer, 1939), 109ff.; Erich Ertel, *Internationale Kartelle und Konzerne der Industrie* (Stuttgart: C. E. Poeschel, 1930), 65ff.; Heinz Müllensiefen, *Kartelle als Produktionsförderer unter besonderer Berücksichtigung der modernen Zusammenschlusstendenzen in der deutschen Maschinenbau-Industrie* (Berlin: Springer, 1926), 32ff.; Siegfried Tschierschky, *Kartell-Organisation* (Berlin: Spaeth & Linde, 1928), 156ff.

rights of use to their inventions, free of charge. Under such cross-licensing agreements the individual agreement partners remained the owners of their own patents. However, companies often took a *second* path, whereby they banded together in treaty partnerships similar to associations, in which the company holding the patent issued licenses to the other associated companies. *Third*, it was possible to transfer the patents to a particular form of organization (e.g., a holding company), which could, in turn, independently transfer licenses or sublicenses to third parties, i.e., to other associated producers.⁸

Hence independent companies working in identical or similar fields of technology were consolidated within patent associations thus assuring themselves mutual use of their patents. Concerns and holding companies (known as trusts) could be created for specific areas of technology, as could cartels, guaranteeing consistent control and implementation of the accumulated patents; existing connections were deepened or consolidated.⁹ The targeted implementation of user or manufacturing rights or rights of sale in license agreements allowed secure production and sales channels to be created at the same time. In connection with the standardized legal defensive rights, it was possible to control patent associations created in this way and to prevent third parties gaining access to the technologies concentrated within those associations. This could, admittedly, have anticompetitive consequences. According to Hans Schäffer in 1929, “exclusive agreements, delivery and distribution barriers, cartel arbitration tribunals, certain controls that one could mutually impose, [and] a whole arsenal of methods” were the instruments available. As a result, he wrote, “today, ultimately, almost no single industry can be described as incapable of forming cartels.”¹⁰

The patent was clearly no longer simply a title of protection benefitting individual inventors. Rather it was increasingly becoming, domestically

⁸ Schramm, *Handbuch für Kartell- und Fachgruppen-Leitungen*, 109f.; Isay, *Patentgemeinschaft*, 9ff.; Salzer, *Austausch von technischen Erfahrungen und Erfindungen*, 53ff.

⁹ Hermann Isay, *Die Funktion der Patente im Wirtschaftskampf* (Berlin: Vahlen, 1927), 39; Robert Liefmann, “Internationale Kartelle und ihre internationale Regelung,” *Zeitschrift für Geopolitik* (1929): 654–57.

¹⁰ Hans Schäffer, “Kartelle und Konzerne,” in *Strukturwandlungen der Deutschen Volkswirtschaft*, vol. 1, ed. B. Harms, 2nd ed. (Berlin: Reimar Hobbing, 1929), 327ff., 344.

and internationally, an object of industrial and cartel agreements, indeed occasionally the instigating factor, and one which was enabling access to external technologies and the expansion of individual product portfolios. In certain fields companies were using patent associations in order to profit from innovative technology and to increase their domestic and international market share. After 1918 in particular, cartel associations led to an increasing interdependence between related branches of industry, even extending beyond national borders. Within certain branches, Schäffer continues, attempts were made to “use specific contracts and agreements in order to create, alongside the natural monopolies, artificial monopolies by legal means.”¹¹ The foundation for such exclusive monopolies, according to Georg Respondek in 1927, was frequently patents from “purely legal monopolies.”¹²

These developments, outlined above, were not without ramifications upon the patent laws and their interpretation by the courts. In the first half of the twentieth century in particular, patents underwent a process of change with respect to how their scope of protection was determined. In a series of decisions, the interpretation of the extent of protection was modified by case law, which in turn served to raise the overall enforceability of patents.

The patent’s scope of protection was related to the “object of invention” according to Section 4 of the German Patent Act of 1891. In 1900 the German Patent Office as well as the Supreme Court of the German Reich still worked on the premise that the content of the invention corresponded with the patent in the shape of the registration documents and the scope of protection. Accordingly, when interpreting the “object of invention,” case law was aligned toward the concept of invention recorded in the patent claim, that is to say, that which the applicant wished to be protected.¹³

¹¹ Ibid., 344: “Ausschließlichkeitsverträge, Lieferungs- und Absatzsperrern, Kartellschiedsgerichte, gewisse Kontrollen, die man sich gegenseitig auferlegte, ein ganzes Arsenal von Mitteln führte dazu, daß man letzten Endes heute kaum mehr eine einzige Industrie als schlecht-hin kartellunfähig bezeichnen kann.”

¹² Georg Respondek, “Arbeitsgemeinschaften und Fragen des Patentrechts bei der internationalen Kartellierung der Industrie,” *Kartell-Rundschau* (1927): 319ff., 328; Siegfried Tschierschky, “Der monopolistische Charakter der Kartelle,” *Kartell-Rundschau* (1926): 325ff.

¹³ “Reichsgericht,” *Gewerblicher Rechtsschutz und Urheberrecht* (1907): 135 (decision of 23.1.1907); “Reichsgericht,” *Blatt für Patent-, Muster- und Zeichenwesen* (1899): 195, 197 (decision of 18.2.1899);

Questions of interpretation were therefore the fault of the applicant. The inventor had to specify the “nature of the invention” in the patent specification. “Only that, which he holds to have invented, will be placed under patent protection, not that, which he has actually, but unknowingly, invented,” declared the Supreme Court of the German Reich on 23 September 1896.¹⁴ The descriptions given by the applicant and the patent office were interpreted as contractual declarations of intent and the scope of protection of the patent was set accordingly.¹⁵ Legal practice responded to the will of the legislators to the degree that the revision of the patent law of 1891 accommodated this interpretation on the recommendation of the affected associations and relevant public.¹⁶

By 1910, however, case law had already moved away from the wording of the patent specification and shifted the focus of its interpretation toward the state of the technology at the time of application. In the *Koks-Löschrinnen* decision of 9 February 1910 the limited significance of the wording of the patent claim in infringement lawsuits in the Supreme Court was directly called into question. The purpose of the patent claim is, first and foremost, to specify the object of invention for engineers “as exactly as possible, but not to precisely define the scope of the resulting patent protection on all sides.” In this context it is important that judgment also be

“Reichsgericht,” *Reichsgericht in Strafsachen* (RGSt), vol. 43, 397, 401 (decision of 25.9.1909); “Reichsgericht,” *Blatt für Patent-, Muster- und Zeichenwesen* (1897): 69, 70 (decision of 23.9.1896); “Reichsgericht,” *Gewerblicher Rechtsschutz und Urheberrecht* (1904): 216, 218 (decision of 16.11.1903); “Reichsgericht,” in *Reichsgericht in Zivilsachen* (RGZ) vol. 79, 186, 187f. (decision of 2.3.1912).

¹⁴ “Reichsgericht,” *Blatt für Patent-, Muster- und Zeichenwesen* (1897): 69, 70 (decision of 23.9.1896).

¹⁵ “Reichsgericht,” *Gewerblicher Rechtsschutz und Urheberrecht* (1908): 343 (decisions of 20.4.1901 and 1.4.1908); Arnold Seligsohn, *Patentgesetz und Gesetz betreffend den Schutz von Gebrauchsmustern*, 4th ed. (Berlin 1909), § 4 Anm. 19a, 128; Paul Kent, *Das Patentgesetz vom 7. April 1891. Kommentar*, vol. 2 (Berlin, 1907), § 20 Anm. 91 and § 4 Anm. 196. Further ref. in Rafael von Heppe, *Patentverletzungen. Eine Analyse der reichsgerichtlichen Rechtsprechung von 1879 bis 1918 zu § 4 und § 35 (§ 34 a.F.) des Patentgesetzes vom 7. April 1891* (Berlin: Duncker & Humblot, 2007), 207ff.

¹⁶ RT-Drucks. 1891 no. 152, 23, of § 20 German Patent Act of 1891: “Die Kommission erweiterte unter Zustimmung der Vertreter der verbündeten Regierungen den § ..., weil sie der Anschauung war, dass diese Formulierung dem Richter die Beurteilung der Tragweite eines Patents wesentlich erleichtern würde”; see also P. Guiland and L. Queck, *Die gesetzgeberische Reform der gewerblichen Schutzrechte* (Berlin: Rothschild, 1919), 132.

reserved for later interpretations.¹⁷ In cases of patent violation the courts were also authorized to evaluate the scope of a patent according to a “retrospectively determined” state of technology. In return the affirmations and claims of the applicant and the patent office lost their scope-limiting power.¹⁸ Their will would, however, remain decisive in the event the scope of protection was restricted, with binding effect, by a clear waiver from the applicant or an explicit limitation by the patent office.¹⁹ The German high court then adhered to the distinction between the object of the invention (application process) and the scope of protection of the patent (infringement process) formulated by Hermann Isay, among others.

The significance of this new jurisdiction lay in its potential to expand patent protection. Even after the *Koks-Löschrinnen* decision and contrary to the previously prevailing separation of responsibility “in case of doubt” an interpretation was possible in which the scope of protection was limited.²⁰ The Supreme Court did, however, refrain from indiscriminate application of this restrictive corrective. The patent could be released from the requested scope of protection, with recourse to technical considerations, after the point of application. The models of (fiscal) equivalence²¹ developed by the Supreme Court also point in this direction, as do those for the protection of modular parts²² and the recognition of product protection in the case of process patents.²³

¹⁷ “Reichsgericht,” *RGZ*, vol. 80, 54, 57 (decision of 9.2.1910); “Reichsgericht,” *Blatt für Patent-, Muster- und Zeichenwesen* (1911): 274 (decision of 28.6.1911); “Reichsgericht,” *Markenschutz und Wettbewerb* (1913): 404 (decision of 8.1.1913); “Reichsgericht,” *Markenschutz und Wettbewerb* (1913): 548f. (decision of 8.1.1913).

¹⁸ Guiland and Queck, *Die gesetzgeberische Reform der gewerblichen Schutzrechte*, 140.

¹⁹ “Reichsgericht,” *Blatt für Patent-, Muster- und Zeichenwesen* (1911): 267 (decision of 9.7.1910); “Reichsgericht,” *RGZ*, vol. 80, 54, 57 (decision of 9.2.1910); Guiland and Queck, *Die gesetzgeberische Reform der gewerblichen Schutzrechte*, 140f.

²⁰ Cf. the unpublished decisions of the Reichsgericht of 28.6.1911 (I 195/10), also Von Heppe, *Patentverletzungen*, 231f.

²¹ Cf. the unpublished decisions of the Reichsgericht of 9.4.1884 (I 53/84) and Reichsgericht (24.4.1889–I 73/89); see also “Reichsgericht,” *RGSt*, vol. 23, 21ff. (29.3.1892); “Reichsgericht,” *Blatt für Patent-, Muster- und Zeichenwesen* (1912): 324, 325 (decision of 2.10.1912).

²² Reichsgericht (18.1.1890–I 314/89).

²³ “Reichsgericht,” *RGSt*, vol. 42, 357ff. (decision of 24.5.1909); “Reichsgericht,” *RGZ*, vol. 22, 8ff. (decision of 14.3.1888).

In the interpretation of a patent, the jurisdiction followed a patent-friendly and therefore, even if not explicitly, industry-friendly course.²⁴ Henceforth it was possible, even independently of the patent claims and prosecution history, for the scope of protection to be decided by the courts in the case of infringement lawsuits. The remark by the courts that reverting to the state of technology would be superfluous, “if the interpretation of the patent gave no cause for doubt,” was disastrous.²⁵ The consequences were that the latest case law well-nigh encouraged and cultivated imprecise or unclear patent claims.²⁶ It generated, according to its critics, a variety of artifices, the aim of which was to receive an “expanded claim” and therefore “clean prosecution histories.”²⁷ Accordingly, the training literature for patent attorneys recommended as unspecific a formulation as possible, in order to keep the scope of protection broad and open.²⁸ The advantages for industry lay in the justified expectation that the courts would establish an expanded scope of protection for existing patents, provided the state of technology could be verified accordingly. In the eyes of contemporaries, the jurisdiction made use of this practice and in doing so, “broke the chains with which the practices of the patent office had bound the development of the patent system.”²⁹

Industrial companies, supported by wide patent portfolios and specialized legal departments, were in the best position to take advantage of the new latitude for consistent implementation of their property rights. Success depended on who had the most stamina in the infringement lawsuit,

²⁴ Julius Magnus, “Einfluß der Wirtschaftslage und ihrer Veränderungen auf den gewerblichen Rechtsschutz,” *Gewerblicher Rechtsschutz und Urheberrecht* (1927): 205ff.

²⁵ “Reichsgericht” *Blatt für Patent-, Muster- und Zeichenwesen* (1911): 274 (28.6.1911); Rathenau, “Zerpflückung von Reichsgerichtsurteilen” *Gewerblicher Rechtsschutz und Urheberrecht* (1912): 173ff.

²⁶ See Guiland and Queck, *Die gesetzgeberische Reform*, 149.

²⁷ Georg Wildhagen, “Der Entwurf des Patentgesetzes,” *Deutsche Juristen-Zeitung* (1914): 47ff., 55: “Eingeweihte behaupten, daß darauf bisweilen bei Patentanmeldungen geradezu spekuliert und absichtlich kautschukartige Fassungen gewählt würden”; W. Dunkhase, *Die Prüfung der Erfindung auf Patentfähigkeit* (Berlin, 1913), 25; B. Tolksdorf, “Gegenstand der Erfindung,” *Gewerblicher Rechtsschutz und Urheberrecht* (1933): 520ff., 526; Guiland and Queck, *Die gesetzgeberische Reform*, 149.

²⁸ E. Müller, *Der Patentanspruch* (Berlin, 1925), 42; Richard Wirth and Hermann Isay, *Der Patentanspruch. Beiträge zu seiner Behandlung und Auslegung* (Berlin: C. Heymann, 1912), 16.

²⁹ Ludwig Wertheimer, “Die Bedeutung des Patentanspruchs,” *Deutsche Juristen-Zeitung*, (1911): 576; Guiland and Queck, *Die gesetzgeberische Reform*, 143.

“those, who in practice had the economic means to keep the case going and engage the most talented attorneys and experts.”³⁰ Accordingly, certain voices point to the fact that it was almost impossible to compete against the “impenetrable patent corruption” of the large concerns and that the legal uncertainty in patent protection “benefitted the economically more dominant.” In the 1920s and 1930s in particular the “contrast between the independent industries that struggled to continue to work and the large concerns, who blatantly took advantage of their patent position, as they did every other means of power” was evident. Some contemporary observers saw independent companies entering a “situation of hopelessness ... in which independent industries capitulate in the face of the many, and in some cases overlapping, patents of the large concerns.” This would be even more likely if, according to the state of proceedings, each individual patent left open the possibility of retroactively adding characteristics to the description of a patent claim text in order to claim a restricted invention concept, or to invoke an expanded scope of protection, enabling a retroactive “ascertainment of the patented idea” supported by the equivalence theory. Hermann Isay also believed in 1927 that “[t]hose wishing to comment on questions of interpretation, must first give their view in favor of or in opposition to the development of trusts” and referred to the great significance of the interpretation of scope of protection for existing industrial cartels and large concerns.³¹ Fritz Haussmann endorsed this view in 1940 and noted that it was “the financial prevalence and the technical superiority ... against which one was attempting to battle, using means that only attacked market-related factors.”³²

The origins of such findings lie in the tendency of German industries, since the end of the nineteenth century, to concentrate and to amalgamate rapidly. The verifiable cartels in Germany in around 1930 far surpassed those in the rest of Europe.³³ One cause for this development can be seen in the important changes in the conditions of industrial production,

³⁰ The following quotes taken from M. A. Besso, *Grenzen des Erfindungsschutzes* (Zürich: Kulturkreis-Verlag, 1934), 18ff.; cf. Isay, *Funktion der Patente*, 35.

³¹ Isay, *Funktion der Patente*, 35.

³² Fritz Haussmann, *Die wirtschaftliche Konzentration an ihrer Schicksalswende. Grundlagen und Aufgaben einer künftigen Trust- und Kartellgestaltung* (Basel: Recht & Gesellschaft, 1940), 247.

³³ Jeffrey Fear, “Cartels,” in *The Oxford Handbook of Business History*, ed. G. Jones and J. Zeitlin (Oxford: Oxford University Press, 2008), 268ff., 275; Harold James, *Deutschland in der Weltwirtschaftskrise* (Stuttgart: Deutsche Verlagsanstalt, 1988), 159.

caused by the First World War. The partitioning of many markets during the war led to the establishment and expansion of many manufacturing facilities in areas, which until 1914 had been served by imports. The return of the German economy to European and international markets after 1918 enabled earlier trade links to be largely restored. However, the markets subsequently began to threaten the industrial branches, which had been established under the pressure of partitioned conditions. In many cases the government reacted to the danger of overproduction and falling prices with protectionist policies, the companies, in contrast, with an increase in price and production agreements in the way of cartelization or strategic cooperation to improve competitiveness.³⁴

One instrument, which at the same time furthered the movement toward concentration and rationalization, was the combination of technical resources in the form of patents and patent pools. There was already evidence of this under conditions of economic growth before 1914, for example, in the chemical industry. In 1905 BASF (Ludwigshafen), Bayer & Co. (Leverkusen) and the Aktiengesellschaft für Anilinfabrikation (Corporation for Aniline Manufacture) in Berlin came together to form a “joint venture” after the dye companies Farbwerke Höchst (Frankfurt a.M.) and Leopold Cassella (Frankfurt a.M.)—from 1906 also Kalle & Co AG, Biebrich—had started to cooperate in a cross-ownership scheme shortly beforehand.³⁵ Although no mutual market policy was implemented in either of the groups of companies, the aggregation of technical and financial resources certainly considerably increased the negotiating leeway of the companies and consequently their competitiveness. This is reflected in the patents they held. Between 1900 and 1910 German companies held 81 percent of the patents registered in the USA for the industrial branches of pharmaceuticals and organic dyes, in the chemicals industry as a whole they still held 43 percent of the patents in the USA.³⁶

³⁴ Matthias Schulz, *Deutschland, der Völkerbund und die Frage der europäischen Wirtschaftsordnung (1925–1933)* (Hamburg: Krämer, 1997), 65ff., 102f.; Christian Kleinschmidt, *Technik und Wirtschaft im 19. und 20. Jahrhundert* (Munich: Oldenbourg, 2006), 32ff.

³⁵ Gottfried Plümpe, *Die I. G. Farbenindustrie AG. Wirtschaft, Technik und Politik 1904–1945* (Berlin: Duncker und Humblot, 1990), 40ff., 47; Werner Abelshauser, ed., *Die BASF. Eine Unternehmensgeschichte* (Munich: Beck, 2002), 130ff., 141f.; William J. Reader, *Imperial Chemical Industries: A History*, 2 vols. (London: Oxford University Press, 1970–75), vol. 1, 120f., 155f., 204.

³⁶ Jonathan Liebenau, “The Management of High Technology: The Use of Information in the German Chemical Industry (1890–1930),” in *International Cartels in Business History*, ed. A. Kudo and T. Hara (Tokyo: University of Tokyo Press, 1992), 57ff., 65.

The process of integrating enterprises was supported and in some cases forced, by the state for military reasons during the First World War, but the trend continued at an entrepreneurial level after 1918. In addition to the improvement in competitiveness, this could also be attributed to attempts to rationalize after the First World War. Examples of strategic patent pools were the “Verband der Funkindustrie e.V” (broadcasting technology), the “Siemens-Lurgi-Kotrell Elektrofilter GmbH” (electronics), the “Ada-Verband” (welding torch technology) or the yeast association known as the “Hefeverband.”³⁷ In addition to these, in 1926 Heinz Müllensiefen provided evidence of 120 patent associations and syndicates in the engineering industry alone, in which around 400 engineering works had a share.³⁸ In the chemical industry for example, the aim was to increase the exchange of technological knowledge and to draw alliances of smaller companies in their wake.³⁹ The German chemical and pharmaceutical industry conglomerate IG Farben (Interessen-Gemeinschaft Farbenindustrie AktienGesellschaft, literally the “community of interests” of dye-making corporations) was formed in 1925. This syndicate was not quite as concerned with standardizing production and research (in contrast to the views of such companies in the years prior to 1914), but the centralization of sales required, among other things, mutual permission for it to use protected products, which underlined and consolidated its excellent

³⁷ See further examples in Neumeyer, *Patentgemeinschaften und deren Aufbau bei amerikanischen Industrieverbänden*, 5f.; Müllensiefen, *Kartelle als Produktionsförderer*, 70ff.; Günther Luxbacher, *Massenproduktion im globalen Kartell. Glühlampen, Röhren und die Rationalisierung der Elektroindustrie bis 1945* (Berlin: Verlag für Geschichte der Naturwissenschaften und der Technik, 2003), 350ff., 429ff.

³⁸ Müllensiefen, *Kartelle als Produktionsförderer*, 45.

³⁹ Cf. Raymond G. Stokes, “Assessing the Damages: Forced Technology Transfer and the German Chemical Industry,” in *Technology Transfer Out of Germany after 1945*, ed. M. Judt and B. Ciesla (Amsterdam: Harwood Academic Publishers, 1996), 81ff.; see contributions by Werner Abelshauser, “Das Produktionsregime der chemischen Industrie im sozialen Produktionssystem der deutschen Wirtschaft des 20. Jahrhunderts,” Kim Coleman, “Technologietransfer zwischen IG Farben und der britischen ICI im Zeitalter der Kartelle (1926–1945),” and Raymond G. Stokes, “Flexible Reaktion: Die Bedeutung des Technologietransfers für die deutsche Chemieindustrie (1925–1961)” in *Technologietransfer aus der deutschen Chemieindustrie (1925–1960)*, ed. Rolf Petri (Berlin: Duncker und Humblot, 2004), 59ff., 121ff., 49ff.; Alexander Engel, “Produktionssysteme im Wettstreit. Wissensorganisation im Kampf um den Weltmarkt für Indigo, 1880–1910.” *Zeitschrift für Unternehmensgeschichte* 50 (2005): 83ff.; Abelshauser, *Die BASF*, 168ff.; Liebenau, “The Management of High Technology,” 57ff.

position in the German chemicals industry.⁴⁰ Georg Respondek judged in 1927 that IG Farben could close the “ring around its cartels” so tightly with its patents that “even strong industries ... could find themselves unexpectedly forced on the defensive.”⁴¹ The reason for this lay with the strategic and international combinations of patents in promising future industries such as the synthesis of ammonia, methanol, mineral oil, and natural rubber. A subsidiary was founded in 1929, in collaboration with the American company Standard Oil, which functioned as an international patent association and administered all patents and other property rights in the area of coal liquefaction for the companies involved.⁴²

A more extensive collaboration was founded in 1924 with the creation of the international light bulb cartel (Phöbus S.A. Compagnie industrielle pour le développement de l'éclairage), in which manufacturers from eighteen countries regulated production and sales among themselves, but also the use of the necessary property rights. This partnership also had its roots in the prewar period. As early as 1911 General Electric (USA), AEG, Siemens & Halske and Deutsche Gasglühlicht AG founded the Patent Interessengemeinschaft wegen Glühlampen (Patent Consortium for Light Bulbs) in order to better manage patent conflicts but also to better insulate the respective domestic markets.⁴³ The directorate of the Osram-Gesellschaft stated after the founding of Phöbus in 1928: “The contract ... is based in the idea of cooperation. It creates the important right of exchange of all inventions, patents, and sometimes even more importantly, experience with regards to manufacture. It draws on the right of typification and standardization throughout the spectrum of bulb production.”⁴⁴

⁴⁰ Abelshauser, *Die BASF*, 231; Plumpe, *Die I. G. Farbenindustrie AG*, 176ff.; Fritz Ter Meer, *I. G. Farben Industrie AG. Ihre Entstehung, Entwicklung und Bedeutung* (Düsseldorf: Econ, 1953), 45f.

⁴¹ Respondek, “Arbeitsgemeinschaften und Fragen des Patentrechts,” 323.

⁴² *Ibid.*, 319ff.; Ertel, *Internationale Kartelle und Konzerne der Industrie*, 72ff.; L. F. Haber, *The Chemical Industry 1900–1930: International Growth and Technological Change* (Oxford: Clarendon Press, 1971), 296ff.; Plumpe, *Die I. G. Farbenindustrie AG*, 259ff.; Coleman, “Technologie transfer zwischen IG Farben und der britischen ICI,” 139; Abelshauser, *Die BASF*, 238ff.

⁴³ Luxbacher, *Massenproduktion im globalen Kartell*, 351f.

⁴⁴ William Meinhardt, “Die rechtliche Gestaltung internationaler Kartelle, insbesondere der Glühlampenvertrag,” *Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ)* 2 (1928): 460ff., 462.

As patents are awarded for a limited period of time, the pressure rose in the large companies to produce new inventions, which would sustain and stabilize corporate integration. To this end the companies invested, at their peak, between 10 and 12 percent of their total turnover in research and development during the 1920s and 1930s.⁴⁵ Instead of wide-ranging fundamental research they were also conducting “patent research,” i.e., all results that were in anyway patentable were legally protected in order to have a technical veto instrument to use against competitors. In 1927 the American Telephone & Telegraph Corporation (AT&T) stated its research philosophy: “It seems obvious that the best defense is to continue activities in ‘no man’s land’ and to maintain such strong engineering, patent and commercial situations ... as to always have something to trade against the accomplishment of other parties.”⁴⁶ The rights of the actual inventor were no longer decisive; the new focus was protecting one’s business from the competition. By the mid-1920s the majority of patents were already being registered by large-scale industry, which had sufficient capital resources behind it and could therefore fund the high financial outlay that research and development required.⁴⁷ However, the numbers of lawsuits in defense of property rights rose accordingly.

No Corrective: Patents and Patent Pools as Objects of Antitrust Law

The manufacturing industry did not just pool entire branches of technology through the property rights consolidated within them but also the rights of defense guaranteed by the patent, such as claims for injunctive

⁴⁵ Respondek, “Arbeitsgemeinschaften und Fragen des Patentrechts,” 324; L. Gohm, *Technologietransfer deutscher Unternehmen in die USA 1870–1939* (St. Katharinen: Scripta-Mercaturae-Verlag, 2000), 273, 276; Paul Erker, “Die Verwissenschaftlichung der Industrie. Zur Geschichte der Industrieforschung in den europäischen und amerikanischen Elektrokonzernen 1890–1930,” *Zeitschrift für Unternehmensgeschichte* 35 (1990): 73–94; Abelshauser, *Die BASF*, 245; Plumpe, *Die I. G. Farbenindustrie AG*, 471ff., 473.

⁴⁶ Quoted in Leonard S. Reich, “Research, Patents and the Struggle to Control Radio: A Study of Big Business and the Use of Industrial Research,” *Business History Review* 51 (1977): 208ff.

⁴⁷ J. Cantwell, “The Evolution of European Industrial Technology in the Interwar Period,” in *Innovations in the European Economy between the Wars*, ed. François Caron, Paul Erker, and Wolfram Fischer (Berlin: Walter de Gruyter, 1995), 277ff.; Gohm, *Technologietransfer*, 273; Liebenau, “The Management of High Technology,” 65ff.

relief, removal of the infringing material, and compensation by the owner. It is clear that the companies included in the associations could allow controlled access to specific competitors in areas of new and innovative technology, but also in some cases exclude them or even cut off their revenue.⁴⁸ If patent law did not prevent the patent associations becoming booming rights' monopolies, and this form of contractually pooling technical resources as a way of participating in external inventive achievements actually appeared to be the volition of legal policy, the only route for newcomers was general civil laws (i.e., §§ 138, 242, 826 BGB). Relief was promised in 1923, however, in the form of a new act against the misuse of economic predominance. The implementation of legally certified property rights for purposes of partitioning competitors and outsiders was also a question of antitrust law,⁴⁹ to which the legal acceptance of patent pools in no way prevented an answer being found.

Jurisprudence and case law in imperial Germany still defined a cartel as a "free agreement between independent entrepreneurs in similar branches of business for the purposes of monopolistic control of the market."⁵⁰ Although the concept of cartels became increasingly controversial after 1918, the tendency of case law to favor the cartels hardly changed at all, even after the introduction of the Act to Prevent the Misuse of Economic Predominance⁵¹ (Kartellverordnung) on 2 November 1923. The legislators consciously avoided a general ban on cartels or similar anticompetitive measures. If a cartel agreement or its implementation endangered the "overall economy" or the "common good," then the Reich's finance minister could still apply to the antitrust courts for the contract or resolution to be nullified (§ 4 para. 1 No. 1 KartellVO). The jurisdiction concluded that cartels should, admittedly taking into account the prohibition

⁴⁸ Schäffer, "Kartelle und Konzerne," 327ff., 343: "wenn diese Maschinen etwa besonders vorteilhaft oder auf Grund eines Patenten geschützt waren, so konnte man durch einen solchen sog. Exklusivvertrag das Zustandekommen neuer Außenseiter verhindern"; Müllensiefen, *Kartelle als Produktionsförderer*, 65f.

⁴⁹ Fritz Kestner, *Der Organisationszwang* (Berlin: Carl Heymann, 1912); idem and O. Lehnich, *Der Organisationszwang. Eine Untersuchung über die Kämpfe zwischen Kartellen und Außenseitern*, 2nd ed. (Berlin: Heymann, 1927); Gustav Lucae, *Außenseiter von Kartellen. Ein Beitrag zum Problem der Wirtschaftsfreiheit* (Berlin: C. Heymann, 1929).

⁵⁰ For a fundamental contribution, see Robert Liefmann, *Kartelle und Trusts* (Stuttgart: Moritz, 1905), 11f.; "Reichsgericht," RGZ, vol. 38, 155, 158f. (decision of 4.2.1897).

⁵¹ RGBl (1923): I, 1067ff.

of abusive practices, continue to be generally admissible. In the opinion of the Supreme Court the “pursuit of a monopolistic position” was in 1927 still “nothing unlawful,” as long as “permitted instruments” were used and “the purposes of the monopoly did not contravene morality.”⁵² This same scale was used to judge the behavior of cartels toward “outsiders” and even before 1914⁵³ was declared to be “cooperative self-help” and, as such, legal.⁵⁴

In cases where patent pools and industrial agreements were concurrently organized as cartels⁵⁵ there was no variation in assessment criteria, either in antitrust law or patent law. The behavior of a patent pool toward outsiders was legal in antitrust law if it was based on the lawful implementation of existing property rights. It followed simultaneously from this argument, that no other outcome could be derived from the provisions available under patent law allowing access to third-party technology even the possibility of a compulsory license, standardized since 1911 in Section 11 of the German Patent Act. If the patent pool was adjudged to be lawful implementation of the patent law, then as a basic principle no compulsory license was to be awarded to outsiders. Granting compulsory licenses was also refused on these grounds, if the economic position of an international patent cartel was endangered.⁵⁶

Two examples are presented here: in 1922 the Association of German Autogenic Industries (ADA Verband) refused to grant eleven companies,

⁵² “Reichsgericht,” *RGZ*, vol. 118, 84, 91 (decision of 21.9.1927).

⁵³ “Reichsgericht,” *RGZ*, vol. 28, 238, 244 (decision of 25.6.1890): “Aus dem Prinzip der Gewerbefreiheit folgt keine Unantastbarkeit des freien Spieles wirtschaftlicher Kräfte in dem Sinne, daß den Gewerbetreibenden der Versuch untersagt wäre, im Wege genossenschaftlicher Selbsthilfe die Bethätigung dieser Kräfte zu regeln und von Ausschreitungen, die für schädlich erachtet werden, abzuhalten”; “Reichsgericht,” *RGZ*, vol. 38, 155, 162 (decision of 4.2.1897); “Reichsgericht,” *RGZ*, vol. 48, 114, 124ff. (decision of 11.4.1901); “Reichsgericht,” *RGZ*, vol. 56, 274, 277 (decision of 14.12.1902).

⁵⁴ “Reichsgericht,” *Markenschutz und Wettbewerb* (1930): 402ff. (decision of 31.5.1930); “Reichskartellgericht,” *Kartell-Rundschau* (1934): 264ff. (decision of 18.4.1934).

⁵⁵ Also see Karl Geiler, “Kartelle und Interessengemeinschaften,” in *Das Handelsgesetzbuch*, vol. 2, 1st part, ed. A. Düringer and M. Hachenburg, 3rd ed. (Mannheim: J. Bensheimer, 1932), 399ff., 414f.; idem, *Gesellschaftliche Organisationsformen des neueren Wirtschaftsrechts*, 2nd ed. (Mannheim: J. Bensheimer, 1922); Rudolf Isay, *Studien im privaten und öffentlichen Kartellrecht* (Mannheim: J. Bensheimer, 1922); idem, “Zur Systematik des Kartellrechts,” *Beiträge zur Erläuterung des deutschen Rechts*, vol. 68 (1927), 10ff.; Isay, *Die Patentgemeinschaft*.

⁵⁶ “Reichsgericht,” *Markenschutz und Wettbewerb* (1930): 402ff. (decision of 31.5.1930).

which were not members of the association, pivotal licenses in oxy-acetylene cutting and welding technology. The outsiders filed a lawsuit with the Reichspatentamt (Patent Office of the German Reich) seeking to be granted a compulsory license, in order to profit from the technology. The lawsuit was rejected in 1923. A compulsory license should not “serve the advancement of an individual’s competitiveness,” even if a cartel held and exploited the patent for oxyacetylene cutting. An appropriate exploitation of the patent, according to the patent office, even through the use of measures designed to repel competition, was justified and implicit in the granting of the right. Even in the circumstances of the patent being exploited by “a comprehensive cartel, syndicate or other similar form of consortium between a section of the interested parties, which secured a certain position of dominance in the economic area in question,” this did not in itself demonstrate that it was in public interest to grant a compulsory license to an outsider.⁵⁷

In the Telefunken decision of 13 April 1934⁵⁸ the antitrust court differentiated precisely between agreements made under antitrust laws and those that were part of patent or licensing contracts.⁵⁹ Cartel characteristics could only be assumed for legal agreements relating to competition and not in order to implement settlements relating to property rights. The cartel-like character of a patent association (in this case known as the Funkverband radio communication association) does not exclude the cartel (the Telefunken-Gesellschaft) from “protecting their patent—or other interests that result in their decision to refuse granting a license.”

⁵⁷ “Reichspatentamt,” *Kartell-Rundschau* 24 (1926): 413, 414 (decision of 20.9.1923).

⁵⁸ “Reichskartellgericht,” *Kartell-Rundschau* (1934): 264ff. (decision of 13.4.1934). Telefunken held numerous key patents in the field of tube and broadcasting technology, which it exploited within the radio communications’ industry association (Verband der Funkindustrie). Only members of the radio communication association were in a position to be granted licenses (known as standard construction permission contracts) by Telefunken and to manufacture radio sets in line with these principles. Manufacturers who were not members of the Funkverband were, not infrequently, excluded from access to this technology through the withholding of licenses or refusal of permission to join the Funkverband. The petitioner (Radiowerke M. Vertriebs-GmbH among others) filed for their exclusion by the defending Funkverband to be found unlawful according to the principles of § 9 KartellVO.

⁵⁹ Schramm, *Handbuch für Kartell- und Fachgruppen-Leitungen*, 108f.; “Reichskartellgericht,” *Kartell-Rundschau* (1934): 264ff. (decision of 13.4.1934); “Reichspatentamt,” *Kartell-Rundschau* (1926): 413, 414 (decision of 20.9.1923); “Reichsgericht,” *Markenschutz und Wettbewerb* (1932): 466, 467 (decision of 15.6.1932).

Even the instruments of the Cartel Act were ineffective against such a decision. Section 11 of the German Patent Act was similarly impotent.⁶⁰

According to the agencies and courts, the inclusion of patents should not result in changes to judgments regarding cartels, which in effect resulted in the nonapplication of Section 11 of the German Patent Act. The Supreme Court went a step further and refused a compulsory license under Section 11 of the German Patent Act, precisely because the liquidation of a quasi-monopolistic international patent cartel would have become a liability for the national members of the association.⁶¹ The jurisdiction of the Supreme Court therefore clearly put the interests of cartels and companies above the interests of competition. The case law of the courts was generally endorsed by contemporary literature⁶² although it did advocate closer supervision by the state.⁶³

This example of case law is also notable because in other cases relating to anticompetitive agreements the judgments on cartel law were considerably more restrictive, e.g., as in the retail industry, where no patents were involved. According to the cartel courts involvement of an “outside” retailer in a cartel should be permitted if “the party to whom access is denied to the supply of goods covered by the cartel contract, is in a position to obtain other goods of similar type and quality outside the cartel.”⁶⁴ The differing judgments, even in the literature, are based on the knowledge

⁶⁰ “Reichskartellgericht,” *Kartell-Rundschau* (1934): 264, 274 (decision of 13.4.1934), Emphasis LP.

⁶¹ “Reichsgericht,” *Markenschutz und Wettbewerb* (1930): 402, 403 (decision of 31.5.1930): “Zudem steht den erwähnten wirtschaftlichen Vorteilen, die sich aus seiner Einführung [der Zwangslizenz, L.P.] ergeben könnten, nach den unwiderlegt gebliebenen Darlegungen der Beklagten eine nicht von der Hand zu weisende Besorgnis überwiegender wirtschaftlicher Nachteile gegenüber. Diese könnten sich in einem Rückgang der hohen Ausfuhrziffer äußern, die von der Beklagten nach ihren Angaben nur dadurch erzielt wird, dass sie als Alleinbenutzerin ihrer Patente in der Lage gewesen ist, mit ausländischen Wettbewerbern vorteilhafte Abkommen abzuschließen und sich so auf dem Weltmarkt ... eine führende Stellung zu verschaffen. Der Fortbestand dieser Abkommen könnte ... durch Erteilung einer Zwangslizenz an den deutschen Patenten in Frage gestellt werden.”

⁶² Karl Schramm, “Verbandswarenzeichen, Patentgemeinschaft und Kartellsperre,” *Zeitschrift der Akademie für deutsches Recht* (1936): 518ff., 520; Karl Schramm, “Beiträge zur Neugestaltung des Kartellrechts,” *Kartell-Rundschau* (1937): 505ff., 510; B. Herzog, “Kontrahierungszwang bei Monopolen im Recht des Ungreifbaren,” *Kartell-Rundschau* (1932): 521ff.; H. Mohs, “Der unbedingte Kontrahierungszwang im Zivilrecht,” *Kartell-Rundschau* (1932): 660ff.

⁶³ Kestner and Lehnich, *Der Organisationszwang*, 342ff.

⁶⁴ “Reichskartellgericht,” *Kartell-Rundschau* (1933): 802, 807 (decision of 15.9.1933).

that technical property rights are a particular kind of economic asset that allow deviations from existing criteria. In comparison with a more traditional economic monopoly, wrote Carl Schramm in 1939, a patent monopoly is something “completely different.” A legal act can extend a monopolistic position based on ownership to one based on technical ideas. The patent assures an exclusive right based on laws and not on contracts, and which represents a “valuable economic asset (such as a technical idea)” and not only retail business.⁶⁵

It is clear that the efforts at concentration and rationalization outlined here must have negative affects upon companies, which, as outsiders, cannot profit from the patent cartels and cannot otherwise withstand the pressure of innovation and competition. The economic disadvantages of such developments are accepted as a necessary evil of rationalization. The complete exploitation of technically more efficient and economically more streamlined companies, even as cartels, was tolerated in the mid-1920s as a “painful operation.”⁶⁶

This did not result in any restrictions for patent laws, particularly not for the rights of patent pools. On the contrary: patents and patent pools were to be the instruments to save the battered medium-sized businesses and so subsequently acquired a macroeconomic significance that was tied up with the traditional incentive-based theory of justification for patent laws. According to Hermann Isay it was precisely this pressure from outsiders that assured technical advances. Because “the patent blocked access to technologies and subsequently to a cartel, outsiders were compelled to seek other ways to advance” and this compulsion led to new inventions.⁶⁷ The necessary and desired technical achievements and improvements were in fact “only achievable in an honest struggle of technical strength, in a struggle, which motivated the proficient to win the day against the competition by advancing his performance.”⁶⁸

⁶⁵ Schramm, *Handbuch für Kartell- und Fachgruppen-Leitungen*, 108, 112; Schramm, “Verbandswarenzeichen, Patentgemeinschaft und Kartellsperre,” 518ff., 520; M. Feldmann, *Kartelle, Trusts und Monopole im Verhältnis zur Handels- und Gewerbefreiheit* (Basel: Helbing & Lichtenhahn, 1931), 30f.

⁶⁶ Julius Flechtheim, “Neue Rechtsformen industrieller Zusammenschlüsse,” in *Strukturwandlungen der Deutschen Volkswirtschaft*, vol. 1, ed. B. Harms, 2nd ed. (Berlin: Hobbing, 1929), 362f.

⁶⁷ Isay, *Funktion der Patente*, 14; Müllensiefen, *Kartelle als Produktionsförderer*, 66.

⁶⁸ Isay, *Funktion der Patente*, 17; idem. *Wirtschaftskrise und gewerblicher Rechtsschutz* (Berlin: Vahlen, 1933), 24; Herbert von Beckerath, *Der moderne Industrialismus*, vol. 1 (Jena: G. Fischer, 1930), 291ff., 292, 300.

With the onset of the economic crisis the discussion surrounding the scope of patent protection became linked to economic and politico-economic considerations. According to Isay, one of the advocates of a flexible interpretation by the courts, it was essential for any debate to recognize that patents have a completely different significance for large concerns than for small and medium-sized businesses.⁶⁹ In 1933 Isay openly demanded of the Supreme Court that its case law should bear the consequences of the economic situation and “in the interests of the medium-sized business, advocate a system of strong patent protection.”⁷⁰ Isay’s espousal of a stronger sovereignty of interpretation by the ordinary courts over the patent office is therefore not only legally motivated but also politico-economically motivated. In order for small companies to hold their ground against selling out to foreign concerns, medium-sized industrial firms must also be able to use convergence through patent associations to their advantage, according to Hermann Isay in 1931. Due to increasing competitive pressures, independent companies were forced to introduce rationalization measures in order to remain in existence. Isay writes, that what was essential was to aim for the “preservation of the industrial enterprise as a technical singularity, resistance against the concentration of industrial firms, against Americanisation.”⁷¹ The economist Herbert von Beckerath, from Bonn, even saw in the patent pools that medium-sized businesses could make a contribution to the organization of the domestic markets, as those associations opposed the patent associations of large-scale industry creating international cartels. A prerequisite was however, that “there were enough strong monopolistic opportunities to suppress possible outsiders and to terminate the expansionist impulses of its members.”⁷² It is not surprising that with such an attitude a critical perception of cartelization did not prevail.

Patents were, however, assigned a dual role at the end of the Weimar Republic. On the one hand they were the foundation of patent pools and therefore also the basis of the anticompetitive concentration of enterprises,

⁶⁹ Isay, *Wirtschaftskrise und gewerblicher Rechtsschutz*, 31.

⁷⁰ Ibid., 32; idem. *Funktion der Patente*, 13, 17.

⁷¹ Isay, *Funktion der Patente*, 38, 49; Erich Ertel, *Internationale Kartelle und Konzerne der Industrie* (Stuttgart: C. E. Poeschel, 1930), 158ff. (“Überfremdungsabwehr”).

⁷² Von Beckerath, *Der moderne Industrialismus*, 292f.

yet on the other they were also an instrument for individual businesses to be able to continue to exist in the face of economic competition from all-powerful cartels and concerns. In addition to the goal of technical advances, the protection of the domestic economy, in particular that of medium-sized businesses was posited as a further role for patent law.⁷³ The starting point was the awareness that needs and interests within industrial concerns no longer corresponded, that one could no longer speak of “industry” as a homogenous economic unit, but that the forces at work were so disparate that patents could no longer be evaluated and regarded from the same viewpoint. Patents did not have the same significance for a large concern as they did for an independent enterprise such as a small or medium-sized company, that is, the industrial small firms sector. From a politico-economic viewpoint, toward the end of the Weimar Republic the patent was not just an incentive for technical advancement. It also had a new function “as a weapon in the economic struggle, in whose power lay the ability to exclude others from the use of specific technical ideas, in particular for the purposes of production and sales of goods,” wrote Hermann Isay in 1926.⁷⁴ The individual legal position of the inventor within the company actually played a minor role.

Conclusion

Patent law developed in the first half of the twentieth century into a powerful industrial tool of evaluation and interrelation. Discussions surrounding inventors’ rights when they are company employees and their appropriate remuneration have certainly accompanied the main dialogue. However, patents have also been transformed into instruments of consolidations and mergers under corporate law. *On the one hand*, patents and their associated property rights increased in significance for domestic and international corporate concentration as objects of mutual exchanges and

⁷³ Isay, *Funktion der Patente*, 33ff.

⁷⁴ Hermann Isay, *Patentgesetz*, 4th ed. (Berlin: Vahlen, 1926), § 4 German Patent Act, Anm. 1; the martial wording was characteristic in that time, cf. Franz Böhm, *Wettbewerb und Monopolkampf. Eine Untersuchung zur Frage des wirtschaftlichen Kampfrechts und zur Frage der rechtlichen Struktur der geltenden Wirtschaftsordnung* (Berlin: C. Heymann, 1933).

licensing agreements within the framework of patent pools. However, the subsequent anticompetitive effects are closely interwoven with questions concerning antitrust laws. The mutual awarding of exclusive rights for specific products in specific markets, the attempt to use the expansion of patents and license agreements to control and to harmonize the speed of development and innovation, the desire to contain manufacturers and secondary producers and, where possible, end users within a network of fixed accords; behind all these developments was the intention to intervene, in order to regulate, in the pricing process and to protect against the price structure, which reflected the unusually high investment risks and costs of innovation versus what could have proven to be ruinously destructive competition for all. However, this did not result in legal restrictions on the patent pools, either in the form of antitrust laws or the generous awarding of compulsory licenses. The law suits in favor of outsiders regarding access to innovations, particularly action taken by outsiders to gain the use of property rights tied into patent associations, were more often than not judged according to conventional, cartel-friendly benchmarks, especially where the international hegemony of German industry was concerned. The consequence of which was almost unrestricted freedom of scope and comprehensive preservation of patent pools and patent cartels.

The increased pooling of technical property rights controlled by financially strong industrial concerns and cartels resulted, *on the other hand*, in a consistent legal implementation of patents, which led to the tendency by the courts to expand the scope of protection, but also led to renewed systemization of interpretation. Patents were increasingly politicized as elements of an internationally strong integration of enterprises and became an indispensable growth factor for companies, and one that was resistant to crisis. The patent developed, particularly during the economic crisis of 1929, into a “weapon of economic struggle,” which cemented its concentrative importance, especially in National Socialism.

The Melting Pot of Copyright Law: *Urheberrecht* in Jerusalem

MICHAEL BIRNHACK*

Introduction

The first edition of Theodor (Benjamin Zeev) Herzl's *Der Judenstaat* (The Jewish state) was published in German, in Vienna and in Leipzig, in 1896. It was a political book about the Zionist project to establish an independent, sovereign Jewish state and its mechanisms. Herzl died in 1904 and did not live to see his dreams materialize. Fifty years later, Herzl's writings were the subject of the first copyright dispute to be litigated in the new state.¹ In 1950, Siegmund Kaznelson, a Jewish publisher who emigrated from Germany, sued the World Zionist Organization (WZO) to prevent it from printing Herzl's writings in Hebrew. Kaznelson argued that his press owned the copyright by way of transfers from Herzl's heirs.

The timing and the subject matter of the lawsuit and the fact that it was the first of its kind were not merely a symbolic coincidence. The new state was, at that time, intensively deliberating its historical foundations and constructing its social fabric. There was a continuous interest in new

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¹ CC 139/50 *Hotza'a Ivrit v. World Zionist Organization*. The first published Israeli copyright case is CC 2187/53 *Acum v. Yaron Theatre*, 9 PM 118 (1953). This was initiated following the case discussed here, but was concluded earlier. During the British Mandate, courts in Palestine adjudicated copyright cases mostly about public performance of recorded music. See Michael D. Birnhack, *Colonial Copyright: Intellectual Property in Mandate Palestine* (Oxford: Oxford University Press, 2012), 260–67.

editions of Herzl's writings. But there were also thorny legal issues. Who owned the copyright? Which law was to be applied to decide ownership? Was it British law that was carried over onto the Israeli system, or perhaps German law, under which the copyright transactions had been made? There was a knot of different laws, intertwined and entangled with each other, which represented a complex web of legal transplants.

From the 1970s, scholars began to study the political-legal phenomenon of legal transplants.² Scholars first identified cases of borrowing/imposing a statute, rule, or doctrine from one country into/onto another. Later, critics questioned the transplantation process and its legitimacy,³ asking who decided to transplant what, when and how, what the balance of power was, and how the legal transplant was received or rejected.⁴

Studies dealing with legal transplants have generally focused on official channels of transplantation, in cases when a foreign government imposed its laws onto an occupied territory or a colony, or when a country willfully adopted a foreign law. This chapter points to yet another channel of legal transplantation, one that is informal and neither organized nor deliberate, and one that arose via an organic channel from the "bottom up" rather than from the "top down." This channel occurs when the law acknowledges patterns of immigration, that is, when immigrants themselves bring their disputes along with them. The law applied in such disputes is often the one that is in force in the originating country. If strong and persistent enough, the immigrant's law might be infused into the law of the new country. This is *transplantation-by-immigration*. The informal channel might collide with state law and formal channels of legal transplants. Organic transplants are often an uphill battle.

Copyright law is particularly susceptible to transplantation-by-immigration. First, copyrighted works easily cross borders. Second, mass immigration often means that immigrants bring along with them their culture, including their creative works. Third, although copyright law is applied

² See Alan Watson, *Legal Transplants: An Approach to Comparative Law*, 2nd ed. (Athens: University of Georgia Press, 1993). For the current discussion, see "Legal Transplant Symposium," *Theoretical Inquiries in Law* 10, no. 2 (2009).

³ For a detailed overview, see Birnhack, *Colonial Copyright*, 23–26, 34–36, 54–57.

⁴ See, e.g., Pierre Legrand, "What 'Legal Transplant'?" in *Adapting Legal Cultures*, ed. David Nelken and J. Fees (Oxford: Hart Publishing, 2001), 55.

in each country on a territorial basis, it is part of a global network that provides legal protection for foreign works. A work made in one country is protected in another. Fourth, the spread of copyright law through colonization, particularly in the case of the British Empire,⁵ means that many countries have similar, though not necessarily identical, laws. This is in itself a legal transplant. Therefore, when copyright owners from one country immigrate to another, their social and legal norms interact with the official law in place.

The copyright case involving Herzl's works provides a case study for transplantation-by-immigration. The case was a meeting of different legal systems. Israeli law was the starting point, then in 1948 it incorporated British law, as applied during the British Mandate in Palestine (1917–48). However, the works at stake were governed by foreign law. Herzl lived most of his adult life in Vienna, wrote and published in Vienna, Berlin, Leipzig and Paris, and his publishing contracts were concluded under German law. His works were translated into Hebrew, Yiddish, English, and French, and they were published in Poland, the United States, Palestine, and elsewhere.

The competing transplants, both formal (the Israeli adoption of British law) and informal (transplantation-by-immigration), represented different legal approaches to the regulation of copyright and, more broadly, the regulation of culture. On the one hand, there was the relatively liberal Anglo-American approach, which enabled the market to handle the issue of copyright ownership under the general rules of contract law and, on the other hand, there was the German approach, which involved an intensely regulated legal regime designed to determine every possible aspect of copyright transactions.

The litigation over copyright ownership of Herzl's works did not result in a judicial opinion. After several years of legal battle, the plaintiff withdrew and the first volume of the new edition of Herzl's writings was published by the WZO in 1955. This chapter discusses the case insofar as it represents a meeting of different legal systems and different legal cultures. It is a play in several acts. The exposition introduces the writings at stake, the characters, and preliminary events. We shall then review the legal

⁵ Birnhack, *Colonial Copyright*.

setting of the stage. Once it is set, the curtains will be raised and we will view the litigation as it unfolded. We shall then conclude with some critical contemplation.

The Characters and a First Dispute

This part introduces the works at stake, the prominent author and his heirs, and the publishers who were involved. We shall then discuss a contract signed in 1933 in Europe, which was the subject of a dispute between Herzl's daughter, Trude Neumann, and Mitzpe Press in Palestine.

Theodor Herzl and His Writings

Born in 1860 in Pest, Hungary, Herzl was to become the engine of the Zionist movement that ultimately resulted in the establishment of the state of Israel. He studied law in Vienna, worked as a clerk for a few months for a judge, but then decided to devote himself to writing.⁶ He wrote plays and short stories, worked as a journalist in Paris, and increasingly engaged in Zionist politics. His biographies point to his continuous interest in literature and writing. Herzl was an avid reader and writer, filling notebooks with book reviews and commentaries.⁷ In the 1880s he wrote plays, which were performed in various places.⁸ He published two collections of articles, stories and journalistic pieces⁹ and authored two books, *Der Judenstaat* (1896) and *Altneuland* (Old, new land) (1902). Throughout his political career, he kept a diary and wrote many articles, letters, and speeches.

Herzl's family life was a continuous tragedy. His marriage was an unhappy one; he excluded his wife from his will, bequeathing his property—including his intellectual property—to his three children.¹⁰ Herzl

⁶ Amos Elon, *Herzl* (New York: Schocken Books, 1975), 76; Alex Bein, *Theodor Herzl: A Biography*, trans. Maurice Samuel (London: East and West Library, 1957), 24.

⁷ Elon, *Herzl*, 56; Marvin Lowenthal, prefatory note to *The Diaries of Theodor Herzl* (London: Victor Gollancz, 1958), v.

⁸ See Elon, *Herzl*, 93 (describing Herzl's career as a playwright as a modest success); Desmond Stewart, *Theodor Herzl: Artist and Politician* (London: Hamish Hamilton, 1974), 371. For the full list of his writings, see Bein, *Theodor Herzl*, 529–31.

⁹ *News from Venus* (1886) and *The Book of Folly* (1888). See Bein, *Theodor Herzl*, 55–56.

¹⁰ Elon, *Herzl*, 321–22; Stewart, *Theodor Herzl*, 284.

died young, at the age of forty-four. His children's fate was also tragic. Pauline, the eldest daughter, died in 1930 of heroin overdose; her brother, Hans, committed suicide on the day of his sister Paulina's funeral.¹¹ The third child, Trude Neumann, also suffered from mental illness. From the age of twenty-five and for the rest of her life, she was committed to clinical institutions. In 1942, she was deported by the Nazis to Theresienstadt, where she died in 1943.¹²

During his lifetime, Herzl saw the publication of his plays and books, but not of his other writings. After his death in 1904, Herzl's literary works were in the hands of his children. Professor Leon Kellner, a friend of Herzl, edited and published a first selection of his political diaries and other writings in 1905, entitled *Zionistische Schriften* (Zionist writings). The publisher was the Jüdischer Verlag (Jewish Press).¹³ It remained unclear which rights the press had acquired and later on there was debate as to whether Hans Herzl had signed a contract with the publisher. The publication was incomplete.¹⁴ After the 1905 publication, an editorial board was established.¹⁵ Over the years there have been many editions of different parts of Herzl's writings in numerous languages.¹⁶ Our discussion is limited to the Hebrew translation in Palestine and Israel.

The Publishers

The first press to deal with Herzl's writing after his death was the Jüdischer Verlag, located in Berlin. Established in 1902, it published Jewish and Zionist publications in German. Although it promoted Zionist ideology, the press was run as a commercial business. From 1905, it was owned by the WZO. From 1921 to 1925, Kaznelson was its general director, after which he bought it and became the owner.¹⁷ Kaznelson held a law degree from

¹¹ Elon, *Herzl*, 405.

¹² See *ibid.*, 116, 92n; Stewart, *Theodore Herzl*, 340–41.

¹³ Herzl, Theodore. *Zionistische Schriften* (Berlin: Jüdischer Verlag, 1905).

¹⁴ Kellner wrote to this effect in the introduction to the 1920 edition, explaining that the executors of the will thought some of the writings were not ripe for publication.

¹⁵ See Lowenthal, prefatory note.

¹⁶ Listings of Israel's National Library in Jerusalem indicate hundreds of different publications. The first Hebrew translation was published in Warsaw, Poland. The first Hebrew publications in Palestine are dated from 1928. Especially popular were Herzl's two books, *Der Judenstaat* and *Altneuland*.

¹⁷ For Kaznelson's biography, see Anatol Schenker, *Der Jüdische Verlag 1902–1938: Zwischen Aufbruch, Blüte und Vernichtung* (Tübingen: Max Niemeyer Verlag, 2003), 263–80.

the German University in Prague, but did not practice law. He described himself as an editor and publisher.¹⁸ Throughout his engagement with the press, Kaznelson was its driving force. In short, from the 1920s he *was* the press.

In 1931, Kaznelson registered a company in Palestine called Hotza'ah Ivrit (Hebrew Press).¹⁹ In 1937, as hostility toward the Jews increased, he immigrated to Palestine. In 1938, in his dual capacity as owner of the Jüdischer Verlag and Hotza'ah Ivrit, he arranged an agreement between the two presses, according to which the former transferred its assets to the latter, which thereby acquired the former's commitments, namely the Verlag's financial obligations to Kaznelson.²⁰ The main assets were the copyright and publishing rights of Herzl's writings, which consisted of his diaries, *Zionistische Schriften*, *Der Judenstaat*, and *Al Parashat Derachim* (At a crossroad), an influential and popular book by Asher Ginsberg, known by his penname Ahad Ha'am (One of the People). In 1938, the Reichskulturkammer (Chamber of Culture) shut down the Jüdischer Verlag in Berlin and destroyed most of its books.

Another publisher involved in the unfolding story was a Hebrew publisher that operated in Palestine from 1925–44, Mitzpe Press (The Observatory).²¹ Mitzpe Press first published some of Herzl's writings in Hebrew in the late 1920s, and then a twelve-volume edition in the 1930s. It played a central role in the 1934–36 dispute and again in the 1940s, as a partner in the WZO's project to publish Herzl's writings.

The last publisher in the current story is the WZO, which was established in 1897 at the first Zionist Congress, and became the main political organ of the Zionist movement. Later the British Mandate Government recognized the WZO as the Jewish agency whose purpose was to advise and cooperate with the British administration.²² The WZO continued to operate after the establishment of Israel. Several of its departments

¹⁸ See his personal files, CZA (Central Zionist Archive) AK181.

¹⁹ See Schenker, *Der Jüdische Verlag*, 449.

²⁰ See Jüdischer Verlag to Hotza'ah Ivrit (15 December 1938), CZA S41/35.

²¹ For details of Mitzpe, see Zohar Shavit, "The Development of Hebrew Publishing in Eretz-Israel," in *The Construction of Hebrew Culture in Eretz Yisrael*, ed., Zohar Shavit (Jerusalem: Israeli Science Foundation, 1989) (Heb.), 199, 255.

²² League of Nations, "Mandate for Palestine," 1922, Art. 4.

published various Zionist publications. The WZO became the defendant in the 1950s litigation, and had an ideological and educational mission rather than commercial motivations.

Contract, 1933, and Copyright Term Extension, 1933–34

According to the Austrian and German laws that were in force in 1904, when Herzl died, the rights to his works were to expire by the end of 1934. A year earlier, on 8 December 1933, Kaznelson traveled to Vienna, where he signed a contract with Trude Neumann, Herzl's last surviving daughter.²³ The contract permitted him to republish some of Herzl's writings, for which Trude was to receive a lump sum, alongside some new yet unpublished works, for which she was to receive royalties.²⁴

Why, one might wonder, was it necessary to establish such a contract concerning material that had already been published? It is unclear whether a contract was established in 1905 between the Jüdischer Verlag and Herzl's heirs.²⁵ Practice indicates that the press had permission to publish the writings in German. Why didn't Kaznelson wait yet another year until the copyright had expired? Kaznelson was aware of the approaching expiration date. Once the works entered the public domain, Kaznelson could have published the works without seeking permission and without payment.

A week after the contract was signed, the Austrian law was amended to extend copyright to a term of fifty years posthumously. A year later, on 13 December 1934, German law was similarly amended. Later experience with copyright term extensions elsewhere teaches that extensions benefit only few works: readers' interest in the majority of works declines within a few years of publication, and their commercial potential is exhausted long before the copyright expires.²⁶ Herzl's writings were, and still are, an

²³ Kaznelson intentionally signed the contract in Berlin, so that it would be subject to German law.

²⁴ A Hebrew translation is available at CZA S41/35.

²⁵ The plaintiff in the 1950 litigation did not attach the 1905 contract to the lawsuit. It asked a defendant to produce a copy of it. The defendant denied the existence of the contract. See CC 139/50 *Hotza'a Ivrit v. World Zionist Organization*, Plaintiff's Demand to Produce Documents (3 March 1953), CZA S41/35; Hearing (15 March 1953), statement by Mr. Scharf, on behalf of plaintiff. Schenker doubts there was such a contract. See Schenker, *Der Jüdische Verlag*, 84.

²⁶ See *Eldred v. Ashcroft*, 537 U.S. 186, 248 (2003) (Breyer, J. dissenting) (only 2 percent of copyrights that had been valid for fifty-five and seventy-five years retained commercial value).

exception, as the public's interest in his writings had not diminished over the years. The parties realized this at the time. Hence, it was obvious that the twenty-year extension was financially profitable. Who was to own the rights over the additional twenty years?

The legislative amendment included a transitory rule: if the copyright was transferred to a third party, the transfer did not hold for the additional twenty years of legal protection. However, there was an exception: if the third party paid for the extended rights, it would retain them. Did Kaznelson know about the forthcoming extensions when he initiated the contract? Did he engineer it so that the lump sum he awarded to Trude would guarantee his publishing rights for the extended twenty year term? Did the payment trigger the exception to the law, so that the rights remained with the publisher? Trude was in a sanatorium in Vienna at the time, but no one suggested that she was incapable of making the contract. Such questions remain unanswered. The contract was presented for interpretation almost twenty years later in Jerusalem. Before that, however, two more events intervened.

The Dispute with Mitzpe Press, 1934–36

The first copyright dispute about the Hebrew publication of Herzl's writings took place during the British Mandate.²⁷ In 1934, while the copyright was still valid under its original terms, Mitzpe Press published a twelve-volume edition, including two biographical volumes, *Altneuland*, *Zionistische Schriften*, diaries, and plays. Anatol Schenker studied the events that followed.²⁸ Kaznelson asked Moritz Bileski, a Jewish lawyer and former Verlag partner who had recently immigrated to Haifa, to sue Mitzpe Press on behalf of Trude, in order to assert the rights over the Hebrew publication.²⁹ However, Trude consulted her own lawyers and negotiated with Mitzpe Press directly, to Kaznelson's dismay.³⁰ The dispute

²⁷ For a detailed discussion, see Birnhack, *Colonial Copyright*, Chapter 11.

²⁸ See Schenker, *Der Jüdische Verlag*, 501–9.

²⁹ *Ibid.*, 500. Kaznelson later said that he had instigated the lawsuit. He explained that, under the 1933 contract, Jüdischer Verlag undertook to protect Trude's copyright. See CC 139/50, Kaznelson testimony (13 April 1953), 13. The WZO earlier suspected that the 1936 suit was Kaznelson's idea. See Organizational Department to Adv. Abraham Riftin (28 January 1951), CZA S5/11.321.

³⁰ See Schenker, *Der Jüdische Verlag*, 506.

was eventually settled by an arbitrator appointed by the Jewish Agency.³¹ The arbitrator ordered the transfer of the Hebrew translation rights to Mitzpe Press at the cost of 125 Palestinian pounds.³²

How could Trude sue Mitzpe Press if Hans Herzl had already transferred the rights to the Jüdischer Verlag in 1905? Or had Trude done so herself in 1933? According to existing evidence, this issue was not raised in the dispute with Mitzpe Press. Perhaps the legal answer was clear to the parties at the time, or perhaps the defendants had no knowledge of the prior contracts. However, when the issue reappeared in the Israeli court in the early 1950s, it was far from obvious.

Inquiry, 1944

Another precursor of the litigation was an exchange of letters in 1944 in Palestine. The Central Zionist Archive (CZA), a department of the WZO, handed Mitzpe Press some of Herzl's letters, which it held, with the aim of publishing them. Kaznelson warned the WZO against publishing them. The WZO requested an expert opinion on German copyright law, which was provided by Salli Hirsch from the prominent law office of Smoira & Rosenblüth.³³ Hirsch interpreted the 1933 contract between the Jüdischer Verlag and Trude according to German law. He concluded that the press had only acquired the publication rights in German, which applied to those of Herzl's works listed in that contract, but no rights for translation. The translation rights remained with Trude. Hirsch then concluded that Mitzpe Press had acquired the rights to publish *all* of Herzl's writings *in Hebrew*, following the 1936 arbitration.

Litigation

By December 1950, when Kaznelson sued the WZO in Jerusalem, Trude was no longer alive. Her only son had committed suicide in 1947. Kaznelson emigrated to Palestine. The Jüdischer Verlag transferred its rights to

³¹ This step is not reported in Schenker's discussion.

³² See *Neumann v. Mitzpe Publishing Co* (12 January 1936), CZA S5/11321.

³³ See S. Hirsch, Opinion (31 May 1944), CZA S5/11321.

Hotza'ah Ivrit and was then shut down by the Nazis; its Berlin offices were destroyed during the war. The British Mandate ended and the state of Israel was established. The legal proceedings were therefore now to take place in Israel under a new jurisdiction. But was it really new?

The Law

Following its foundation in 1948, Israel incorporated the entire Mandatory British legal system, subject to some constitutional changes.³⁴ This legal corpus included copyright law. As in many territories under British control, there were two primary pieces of copyright legislation in place. The Imperial Copyright Act of 1911, extended to Palestine in 1924,³⁵ included all principal rules, and the Copyright Ordinance of 1924, enacted by the High Commissioner of Palestine,³⁶ supplemented the act by setting criminal offences and regulating customs.

The British law applied in Palestine was a top-down legal transplant, meant first and foremost to serve British interests.³⁷ It was part of a coordinated imperial project,³⁸ an element within the internationalization of copyright law,³⁹ and coincided with the aims of the mandate to promote the region. The British, on behalf of Palestine, joined the Berne Convention for the Protection of Literary and Artistic Works. Under the Berne Convention, foreign works were protected in Palestine as if they were local works. Austria and Germany were members of this convention. Thus, there was no doubt that Herzl's writings enjoyed legal protection in Palestine, and that Israeli courts had jurisdiction. However, the question as to which law was applicable remained open.

³⁴ Law and Administration Ordinance 1948, s. 11.

³⁵ Copyright Act 1911 (Extension to Palestine) Order 1924, 114 Official Gazette 643, extending Copyright Act 1911, 1 & 2 Geo. 5, c. 46 (Eng.). The 1911 act was officially published in Palestine only in 1934. See Copyright Act 1911, 3 Laws of Palestine 2475 (Drayton) (Eng.).

³⁶ See 114 Official Gazette 623 (1 May 1924) (draft) and 117 Official Gazette 711 (5 June 1924) (promulgation).

³⁷ See Birnhack, *Colonial Copyright*.

³⁸ See Lionel Bently, "The 'Extraordinary Multiplicity' of Intellectual Property Laws in the British Colonies in the Nineteenth Century," *Theoretical Inquiries in Law* 12 (2011): 161.

³⁹ See Catherine Seville, *The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in the Nineteenth Century* (Cambridge: Cambridge University Press, 2006).

Under British law, copyright was conceptualized as a bundle of rights, including publication and translation rights.⁴⁰ The copyright owner could separate the bundle, and authorize, for example, one party to reproduce the work, another to publicly perform it, and yet another to translate it.⁴¹ Transactions were subject only to general contractual principles, but had to be in writing.⁴²

German copyright law differed in many aspects regarding the structure of the law, the scope of legal protection, and the degree of interference with copyright transactions. It had two components, including *Urheberrecht*, a term usually translated as copyright,⁴³ and publishing rights, *Verlagsrecht*, which were regulated by a separate statute.⁴⁴ The former set the fundamental principles of the law and the latter regulated the relationship between authors and publishers.

The *Verlagsrecht* was a rather paternalistic statute, containing a series of default rules in favor of authors. Reversing the default rules was possible, but required an explicit action, which placed the issue on the negotiation table.⁴⁵ For example, the statute included rules capping the number of copies of the first edition to 1,000 (§5), affirming the author's right to make alterations to the work until the production is completed (§12), and the publisher's duties to act "in the appropriate and customary way." (§14) The statute even defined the number of complementary copies the author would receive (§25).

Crucial to our discussion, the *Verlagsrecht* regulated only publishing rights in the original language of the manuscript.⁴⁶ Translations rights remained the possession of authors, unless the parties explicitly agreed

⁴⁰ Copyright Act 1911, §1(2).

⁴¹ Copyright Act, §5(2).

⁴² Ibid.

⁴³ See *Gesetz betreffend das Urheberrecht an Werken der Literatur und der Tonkunst* (19 June 1901) (Ger.). This act came into force on 1 January 1902. An English translation is available in *The Law of Copyright in Germany Being an English translation of: I- The German Act of 19 June 1901, Relating to Copyright in Literary and Musical Works; II- The German Act of 19 June 1901, Relating to the Right of Publication* (London: Longmans & Co., 1902).

⁴⁴ See *Das Verlagsrecht: Reichsgesetz über das Verlagsrecht vom (19 June 1901)*.

⁴⁵ Today we would call it penalty default rules. See Ian Ayers and R. Gertner, "Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules," *Yale Law Journal* 99 (1989): 97–100.

⁴⁶ *Verlagsrecht*, 1901, §2.

otherwise.⁴⁷ This structure, combining copyright law and publishing rights, meant that the author could license the publishing rights in German and yet maintain control of the copyright. Accordingly, the author could still permit a third party to translate the work into another language.⁴⁸

This structure initially appears to have coincided with British copyright law. Under both laws, an author was entitled to split their rights and license separate components to different parties.⁴⁹ The difference was that British law left such transactions to the market, subject only to general contract law principles, whereas German law extensively intervened in the transaction. This difference reflected different conceptions of copyright law. Under British law, copyright was considered as a property right in an intangible asset, albeit one which was limited in scope, duration and power. Under German law, copyright was more of a personal right, which explains the rather paternalistic protection.⁵⁰ The legal differences and the conceptual gaps are the key to figuring out the disputes regarding Herzl's writings.

The Lawsuit

In 1948, the Newman Press, an offspring of Mitzpe Press, published a volume of Herzl's letters in Hebrew. The WZO published several of Herzl's writings in Hebrew and French. Kaznelson, as the manager and owner of Hotza'ah Ivrit, decided that it was time to act. In December 1950 he filed a lawsuit in the District Court of Jerusalem against the WZO. The lawsuit itself has not been found, but records of defendants' replies, trial testimonies, and WZO correspondence, as well as newspaper reports, fill the gap.⁵¹

The plaintiff, Hotza'ah Ivrit, argued that it was a sister company of the Jüdischer Verlag and that it had received all its rights. It argued that, in

⁴⁷ Urheberrecht, 1901, §14.

⁴⁸ Urheberrecht, 1901, §12.

⁴⁹ Compare Urheberrecht, 1901, §8 (Ger.) and 1911 Copyright Act, §5 (Isr.).

⁵⁰ The different attitudes persist to this day. See, e.g., the different treatment of the work-made-for-hire doctrine, discussed in Michael D. Birnhack, "Who Owns Bratz? The Integration of Copyright Law and Employment Law," *Fordham Intellectual Property, Media & Entertainment Law Journal* 20 (2009): 117–21.

⁵¹ See CC 139/50 *Hotza'a Ivrit v. World Zionist Organization*, Statement of Defense (5 February 1951), CZA S41/35; "Copyright Lawsuit against the Zionist Organization," *Davar*, 1 January 1951 (Heb.); "Herzl's Writings: Subject to a Tort Case," *Haaretz*, 2 January 1951 (Heb.).

1905, the Jüdischer Verlag acquired the exclusive copyright to Herzl's *Zionistische Schriften* and *Der Judenstaat*, and that the 1933 contract with Trude accorded it the exclusive copyright to *all* of Herzl's writings, including hitherto unpublished letters and diaries, though excluding *Altneuland*. It listed many WZO publications that allegedly infringed its rights. The plaintiff asked for damages of 5,900 Israeli pounds,⁵² a permanent injunction, and an order to hand over the plates.

In its reply, the defendant WZO followed the expert opinion it received in 1944 from Hirsch by denying the existence of a 1905 contract, and focused on the interpretation of the 1933 contract between the Jüdischer Verlag and Trude. As such, the defendant referred to German law which, it argued, should govern the interpretation of the contract. Accordingly, it argued that the plaintiff owned, at most, the publishing rights in German. The WZO argued that the plaintiff could not own the copyright of the works, and especially not translation rights, which remained with the original copyright owners. Moreover, the WZO argued that any rights belonging to Trude had already been transferred to Mitzpe Press in line with the 1936 arbitration.

Apart from factual arguments about the particular writings and other details, the overall picture was clear. Both sides assumed that the works were appropriate subject matter of copyright law and that they were protected in Israel, even though they had been authored before the state was established, and even though they had been authored and published abroad. The legal dispute was about ownership: Who owned which rights to which of Herzl's writings?

The two rival positions are revealing. The plaintiff seems to have treated its alleged rights under the British, now Israeli, concept of copyright, as a unified right that included reproduction, publication and translation rights. The defendant subjected the works and the transactions to the foreign (German) law under which the contracts had been made, by distinguishing between copyright and publishing rights.⁵³

⁵² In some documents the sum is listed as 9,500 pounds.

⁵³ The WZO lawyers raised this issue with their consulting expert on German law, Hirsch, in 1949. He repeated his 1944 view, based on the application of German law to the facts. See WZO to Hirsch (undated letter, probably November 1949), and Hirsch to WZO (1 December 1949), CZA S5/11321.

The Jurists

The litigation was managed by the lawyers. Kaznelson's lawyer was Mendel Scharf. He grew up in Chemnitz, Saxony, began his legal studies in Leipzig in the 1930s, but was expelled under the Nazi regime.⁵⁴ He then immigrated to Palestine, studied in British law classes in Jerusalem, was admitted to the local bar in 1938,⁵⁵ and then pursued his studies at the University of London, where he received a degree in 1946. He was familiar with all legal systems at stake and spoke fluent German.⁵⁶

The WZO appointed Abraham Riftin and Yehoshua Freudenheim to lead the defense.⁵⁷ Salli Hirsch, who was involved in previous rounds, died shortly before the lawsuit was initiated.⁵⁸

The case was litigated before Judge Benzion Shereshevsky. He was born in Königsberg, East Prussia, in 1907, studied law in Berlin from 1925 to 1929, and worked as a clerk in a court in Königsberg. In 1932 he served as a judge in Berlin, and worked as a lawyer from 1932 to 1933. He immigrated to Palestine in 1934, where he passed the bar exam in 1936. He was appointed to be a judge in 1949.⁵⁹

Thus, at least some of the jurists involved, and some of the parties (Kaznelson) were familiar with German law. They were part of the fifth wave of immigration, that is, Jews who immigrated to Palestine from Germany, known as *Yekkes*, who were an influential group within the

⁵⁴ Scharf commenced his studies in May 1932, and he was supposed to graduate in 1937, but he was expelled in June 1933. University of Leipzig Archive, file no. 190624.

⁵⁵ See "Eight New Members of the Palestine Bar," *Palestine Post*, 6 (2 May 1938).

⁵⁶ I am indebted to Daphna and Ze'ev Scharf for information about their late father. Email messages to author, 9 and 15 April 2012.

⁵⁷ Riftin spoke Polish and Russian. See Gabriel Strassman, *Wearing the Robes: A History of the Legal Profession until 1962* (Tel-Aviv: Israeli Bar Association Press, 1984) (Heb.), 59. Freudenheim later wrote several books on constitutional law. On the legal profession and legal education in Mandate Palestine generally, see Assaf Likhovski, *Law and Identity in Mandate Palestine* (Chapel Hill: University of North Carolina Press, 2006), 25–26, 106–23.

⁵⁸ See Simone Ladwig-Winters, *Anwalt ohne Recht: das Schicksal jüdischer Rechtsanwälte in Berlin nach 1933* (Berlin: Bebra, 2007), 176. Hirsch was sixty-five years old when he died.

⁵⁹ The biographical data is based on the Israeli Supreme Court's Web site (http://elyon1.court.gov.il/heb/cv/fe_html_out/judgesDimus/k_hayim/299995976.htm) and Yahli Shereshevsky (the judge's grandson), email message to author, 27 March 2012. Later on, Shereshevsky was the president of the District Court in Jerusalem (1962), and a Supreme Court justice (1975).

emerging local legal field.⁶⁰ In the current case, German law was part of the dispute itself.

In the Courtroom

The court hearings took place in 1953, with long consecutive days of testimony and cross-investigation. The protocols of seven of the hearings survived, and the picture is supplemented by detailed news reports.⁶¹ The litigation was complex, intense and probably expensive. Dozens of documents were submitted, including letters, contracts, and numerous publications. By and large, it was a one-man show run by Kaznelson. Although he had already been living in Palestine and Israel for sixteen years, he testified in German rather than in Hebrew, with the aid of a simultaneous translation.⁶² Every detail was recorded. The men (there were no women) were acutely attuned to the facts. Both sides sought the same prize, that is, an indication of the ownership of the writings at stake.

The legal setting should be considered against the background of the social, cultural and political context. The early 1950s were a time of highly heated and deeply emotional political and cultural controversy about the relationship between Israel and Germany. By then, Israelis had already learned about the terrible fate of their families and friends in Europe; about the destruction of an entire society. They were trying to grapple with the unbearable horror of the Holocaust. In 1952, the Israeli government concluded an extremely controversial reparations agreement with West Germany designed to compensate Holocaust survivors.⁶³ There were mass demonstrations and heated political protests. The public mood did not favor anything with a German accent.

⁶⁰ See, e.g., F. Oz-Salzberger and E. M. Salzberger, "The Hidden German Sources of the Israeli Supreme Court," *Tel-Aviv University Studies in Law* 15 (2000): 79; Rakefet Sela-Sheffy, "The Jekes in the Legal Field and Bourgeois Culture in Pre-Israel British Palestine," *Iyunim BiTku-mat Israel* 13 (2003): 295 (Heb.). Later research shows that the actual footprints of German law on Israeli law were minor, with less than 0.5 percent of judicial citations pointing to continental sources. See Y. Shachar, R. Harris, and M. Gross, "Citation Practices of the Supreme Court, Quantitative Analysis," *Mishpatim* 27 (1996): 119, 153 (Heb.). However, as Oz-Salzberger and Salzberger argue, the influence was broader and more subtle.

⁶¹ See CZA S5/12455.

⁶² Multilingual court hearings were not uncommon during the Mandate period. See Strassman, *Wearing the Robes*, 59–60.

⁶³ See, e.g., Yechiam Weitz, "Moshe Sharett and Reparations from Germany, 1949–1952," *Cathedra* 115 (2005): 157 (Heb.).

The courtroom in Jerusalem could not be isolated from the outside world. Arguing about the details of German law in an Israeli court was far from routine. We can only imagine that people in the courtroom shared the sense that this event was somewhat historic. The case was, after all, about Herzl, and about things that happened “there,” in Germany and Austria before the Holocaust and the war. Now an Israeli court, operating under the sovereign flag of the newly established Jewish state, was hearing a case about the fate of *Der Judenstaat*, a case conducted mostly in German and mostly under German law.

Siegmund Kaznelson testified at length. He provided information about his legal education, his domination of the Jüdischer Verlag since the 1920s, the establishment of Hotza’ah Ivrit, his commercial contacts with Trude Neumann and his activities connected with the publications of Herzl’s writings.⁶⁴ He admitted that he did not have a copy of the 1905 contract between Hans Herzl and the Jüdischer Verlag,⁶⁵ but pointed out numerous references, such as copyright notices in the books, to prove that the rights were transferred to the press.⁶⁶

The 1933 contract between the Jüdischer Verlag and Trude was at the center of the testimony. It turned out that Kaznelson wrote the contract himself, and made sure it was subject to German law.⁶⁷ He explained every detail. His argument was clear. The Jüdischer Verlag owned the full copyright to Herzl’s writings, including publishing rights and translation rights.⁶⁸ Kaznelson was familiar with the two German laws, the *Urheberrecht* and the *Verlagsrecht*.⁶⁹ The contract, he insisted, was made according to *both*, which meant that the publisher had acquired permission as to exercise *all* possible rights, including translation rights into Hebrew.⁷⁰ Kaznelson further insisted that the fact that he was the one who had initiated Trude’s 1936 lawsuit against Mitzpe Press was another indication that his publishing house owned the copyright under the 1933 contract.⁷¹

⁶⁴ CC 139/50, Testimony, 14–16 April 1953, CZA S5/12.455.

⁶⁵ Testimony, 15 March 1953.

⁶⁶ Testimony, 16 March 1953.

⁶⁷ Testimony, 14 April 1953.

⁶⁸ Testimony, 16 March 1953; 13 April 1953.

⁶⁹ Testimony, 14 April 1953.

⁷⁰ Testimony, 14 and 16 April 1953.

⁷¹ Testimony, 13 April 1953.

Abraham Riftin led a relentless cross-examination, focusing on facts that were relevant to understanding the legal structure of the 1933 contract. For those familiar with German publishing contracts of the time, it was clear that the contract was based on *Verlagsrecht*, for it dealt only with the publishing rights of original material in German, and did not transfer translations rights to the publisher. This was the repeated view of Salli Hirsch as he expressed himself to the WZO in 1944 and 1949.⁷² Kaznelson argued that both the *Verlagsrecht* and the *Urheberrecht* guided him, rather than British law, but added that the lawsuit was submitted according to British law.⁷³ He explained that, under German law, the publisher gained the rights upon receiving the manuscript whereas, under British law, the rights were transferred upon concluding the contract.

Indeed, this was the crux of the legal matter. Had the 1933 contract been interpreted under British law, in line with its unified concept of copyright law, it is quite likely that the conclusion would have been that the Jüdischer Verlag acquired all rights, including translation rights for the writings listed in the contract. However, if this were the case, then the 1936 arbitration between Trude and Mitzpe Press, initiated and operated from afar by Kaznelson, would be null and void, and perhaps even a sham. For how could Trude sue for the infringement of rights she no longer owned? On the other hand, had the 1933 contract been interpreted under German law, the conclusion was likely to be that the Jüdischer Verlag held only the publishing rights in German. Kaznelson tried to have the best of both worlds.

The hearings continued into 1954. Judge Shereshevsky suggested that the parties settle the case. Kaznelson was quick to suggest a joint publication of two new volumes of Herzl's extensive correspondence, each containing eight to nine hundred pages.⁷⁴ The negotiations failed and the case continued.

A Surprising Turn

Earlier, in 1951, as the WZO prepared for the trial, its lawyers had access to additional material. The lawyer's internal comments and memoranda reveal that they held the 1934–35 correspondence between Kaznelson and

⁷² See S. Hirsch, Opinion (31 May 1944), CZA S5/11321.

⁷³ Testimony, 16 April 1953.

⁷⁴ Scharf to Freudenheim, WZO (6 January 1954).

his Palestinian lawyer, Bileski, concerning the dispute with Mitzpe Press. The WZO now sought permission to submit the correspondence to the court. Kaznelson objected, arguing that it would violate attorney–client privilege. The WZO responded that it did not obtain the correspondence from Kaznelson and that his privilege had therefore not been violated. The source was different. When Bileski died in 1946,⁷⁵ his widow handed over his office material, including the correspondence, to the Central Zionist Archive, operated by the WZO, and was therefore at its disposal.⁷⁶

The judge admitted the correspondence.⁷⁷ The letters indicated that Kaznelson was very familiar with the copyright laws of Germany, Austria, and Palestine, and with the Berne Convention. When he signed the 1933 contract with Trude, he already knew that the term of copyright in Austria was about to be extended to fifty years posthumously, but not that a similar extension would take place in Germany a year later.⁷⁸ The correspondence revealed that Kaznelson knew very well that the Jüdischer Verlag had acquired only the publishing rights in German, and no other rights.⁷⁹ He did not acquire the right to publish the works in Hebrew. His case collapsed.

Eventually the picture became more clear. The 1905 contract, if there was one, and the 1933 contract with Trude only dealt with publishing rights in German, under the *Verlagsrecht*. All other rights remained Trude's. Hence she was the correct plaintiff in the 1936 arbitration against Mitzpe Press in Palestine. In short, she held the translation rights in Hebrew. As a result of the arbitration, the copyright was transferred to Mitzpe Press, including the Hebrew translation rights. Thus, the Jüdischer Verlag did not own the translation rights and could not transfer such rights to Hotza'ah Ivrit. The WZO, on the other hand, could collaborate with Mitzpe Press's successor.

⁷⁵ For a biographical entry about Bileski, see Ladwig-Winters, *Anwalt ohne Recht*, 124. He was fifty-seven years old when he died.

⁷⁶ The correspondence is still available, see CZA S5/10.396 (in German).

⁷⁷ The ruling was reported in subsequent letters of the WZO lawyers to their client and in news reports. See Riftin and Freudenheim to WZO (12 April 1954); "Tort Suit on Herzl's Writing Cancelled," *Al HaMishmar*, 20 April 1954.

⁷⁸ Kaznelson to Bileski (20 September 1934; 10 October 1934), CZA S5/10.396.

⁷⁹ See, e.g., Kaznelson to Bileski (17 October 1934; 3 January 1935), *ibid*.

In April 1954, Kaznelson discontinued the lawsuit over Herzl's writings. The judge issued an order to this effect.⁸⁰ One small issue in the case still remained open, a text written by Ahad Ha'am about Herzl. However, Kaznelson discontinued that part of the lawsuit in December 1955 as well.⁸¹ The case was over. The copyright to Herzl's works expired by the end of 1954, fifty years after his death. Kaznelson died in 1959.⁸²

Legal Transplants and Concluding Thoughts

What can we make of the case? Other than observing the drama that took place in the courtroom in Jerusalem, we can apply legal or institutional analysis, or even focus on the identity of Herzl. A less obvious approach to this case is that of legal transplants. Contemporary literature on legal transplants recommends us to critically challenge the initial identification of a law as a case of legal transplant. The lesson we may learn from this kind of approach is that we should consider legal transplants as an ongoing process rather than as a singular event. Accordingly, we should study not only the act of transplantation, but explore the ways in which the transplants were received in the recipient country. Pierre Legrand aptly concluded that, "As [a legal rule] crosses boundaries, the original rule necessarily undergoes a change that affects it *qua* rule."⁸³

Herzl's copyright case offers yet another example of the complexity of legal transplantation. It points to the multiple channels of transplantation. We can characterize these channels in terms of several different parameters, such as direct/indirect, formal/informal, statutory/judicial, or brute/subtle. A rich taxonomy may emerge. The case illustrates the intersection of several channels of legal transplantation.

Israeli law willingly adopted the pre-Israeli British Mandate law, including copyright law. This was a direct, formal adoption by the recipient. Earlier, the British exported (or "extended" according to the term used) their own law to Palestine in a formal and direct manner that was initiated

⁸⁰ CC 139/50 Order (9 April 1954).

⁸¹ See Freudenheim to WZO (28 December 1955), CZA S5/11.321.

⁸² "Siegmond Kaznelson," *Davar* 4 (22 March 1959).

⁸³ Legrand, "What 'Legal Transplant'?", 63.

by the donor, yet phrased as if it were to benefit the recipient. This particular form of copyright law, which includes an international legal network, made it possible to protect foreign works locally. But the more specific legal rules that were applied in the Herzl case concerning ownership and transactions were taken from another source. In the end, it was British–Israeli evidence law that facilitated the submission of the correspondence, and German law that determined the outcome. Once it became clear that Kaznelson did not own the copyright, he had no choice but to discontinue the lawsuit. He did not dispute the application of German law.

The case teaches us that there is another *potential* channel of legal transplants, one that is informal, indirect and subtle. German law was not imposed by the state, nor was it part of formal law. It was not obvious that it should apply at all. The formal law opened a window to protect foreign works, thus enabling the particular circumstances of each work to bring with it the foreign law. The particular law followed the immigrants and the work of authorship. Some immigrants brought the old law with them. In situations of mass immigration, cases in which immigrants brought along a dispute from the old country to their new country and applied the law of the original country were not unusual. Such situations often arose in cases of matrimonial disputes. This channel of transplantation-by-immigration competes with formal law, and with social cohesion processes, namely, the social melting pot. More research is needed to trace the effect of this informal, bottom-up channel of legal transplants.

In the context of copyright law, transplantation-by-immigration has largely elapsed. As time passed, the number of works written in Europe by authors who then immigrated to Israel decreased and copyright terms expired. Eventually, authors, publishers, and lawyers accustomed themselves to the local (Israeli–British) law, such that the formal statutory transplant overcame the informal, organic one.

“Aryanization” Expanded? Patent Rights of Jews under the Nazi Regime*

LIDA BARNER

The following chapter examines the fate of intellectual property rights owned by Jews who lived in Nazi-occupied Europe.¹ When the authors and inventors of creations protected by patent, trademark and copyright law were defined as “non-Aryan” and purged from society, what became of the rights to their innovations and the creations themselves? One of the few statements to be found relating to these aspects was by Göring in 1938: “Jewish patents are property values and as such are to be Aryanized as well.”² However, what he and others considered “Jewish patents,” whether this call for “aryanization” (that is, the transfer to “Aryans”) was to extend to other types of intellectual property, and how it was put into practice has been largely unexplored.³ Yet, an analysis of the fate of intellectual

*The chapter is an early result of the author’s PhD project on “Jewish” intellectual property rights in Nazi Germany, in which copyrights and trademarks by Jews will be discussed as well. As the article gives an account of this work in progress, its conclusions are not complete. It should rather raise awareness of the multifold questions touching on intellectual property rights of the deprived Jewish population that have until now not been analyzed. Terms such as “Jews” or “Jewish” inventors or patent holders in this article refer to people whom the Nazis defined and persecuted as Jews, that is, because they belonged to an allegedly “non-Aryan” race. This does not involve a statement about their personal identification. Terms like “Jewish patents” will be used with quotation marks to show their origin in Nazi language. For Nazi language, see Cornelia Schmitz-Berning, *Vokabular des Nationalsozialismus* (Berlin: de Gruyter, 2000).

¹For the term “intellectual property,” see Alexander Peukert, “Geistiges Eigentum,” in *Handwörterbuch des Europäischen Privatrechts*, vol. 1, ed. Jürgen Basedow, Klaus J. Hopt, and Reinhard Zimmermann (Tübingen: Mohr Siebeck, 2009), 648–52. For the structure of German intellectual property law in this period, see Werner Schubert, ed., *Ausschüsse für den gewerblichen Rechtsschutz (Patent-, Warenzeichen-, Geschmacksmusterrecht, Wettbewerbsrecht), für Urheber- und Verlagsrecht sowie für Kartellrecht 1934–1943* (Frankfurt am Main: Peter Lang, 1999).

²“Additional Information on Some Details of Hitler’s Oral Orders,” 28 December 1938, quoted in Norbert Kampe, ed., *Emigration and Expulsion of German Jews, 1933–1945: A Documentary History* (Munich: Saur, 1992), 469.

³Examples of the literature on expropriation and restitution in which intellectual property is neglected are Constantin Goschler and Jürgen Lillteicher, *“Arisierung” und Restitution:*

properties of those defined as Jews by the Nazis is of much value for the history of the concept of intellectual property. The expropriation of the Jews was “one of the largest transformations in property ownership in modern German history.”⁴ It entailed an extensive, state-sanctioned and institutionalized program of confiscation and robbery of the Jewish population, a concept of “Jewish property,” and was, by reducing victims to their assets, a crucial step and accelerator in the process of social exclusion and physical annihilation in the Holocaust.⁵ However, it is unclear how far this concept of “Jewish property” went and whether it was expanded to intangible assets or intellectual property as well.⁶

The aim of this chapter is thus to trace the expansion of the notion of “Jewish property” into the realm of intellectual property. Although the questions this chapter raises concern all types of intellectual property, it will do so by example of the patent area. It will examine a) the possibilities of German patent law to make use of or exploit the patent rights of Jews, and to raise the question whether the legal corpus was altered or expanded to facilitate the discrimination of Jewish right holders, and b) to inquire, exemplified by a case study, what could happen to a “Jewish

Die Rückerstattung jüdischen Eigentums in Deutschland und Österreich nach 1945 und 1989 (Göttingen: Wallstein, 2002); and Martin C. Dean, *Robbing the Jews: The Confiscation of Jewish Property in the Holocaust, 1933–1945* (New York: Cambridge University Press, 2008). Recent discussions of Nazi inventor policy or patent law have also not addressed the topic of this article. See, e.g., Kees Gispens, *Poems in Steel: National Socialism and the Politics of Inventing from Weimar to Bonn* (New York: Berghahn Books, 2002); or Margit Seckelmann, “Der Dienst am schöpferischen Ingenium der Nation?: Die Entwicklung des Patentrechts im Nationalsozialismus,” in *Wirtschaftssteuerung durch Recht: Studien zur Entwicklung des Wirtschaftsrechts im Interventionsstaat des “Dritten Reichs”*, ed. Johannes Bähr and Ralf Banken (Frankfurt: Klostermann, 2005), 237–79.

⁴ Frank Bajohr, “Aryanisation and Restitution in Germany,” in *Robbery and Restitution: The Conflict over Jewish Property in Europe*, ed. Martin Dean, Constantin Goshler, and Philipp Ther (New York: Berghahn Books, 2008), 33.

⁵ The pioneer in Holocaust historiography, Raul Hilberg, had already emphasized that the expropriation of the Jews was a crucial step in their destruction by the Nazis. See Raul Hilberg, *The Destruction of the European Jews*, 3 vols., 3rd ed. (New Haven: Yale University Press, 2003), vol. 1, chapter 1.

⁶ New approaches to the study of intellectual properties in the United States analyze legal regimes of intellectual property with regard to minority right holders, yet the same question is still a desideratum concerning the fate of the Jews in the Holocaust. See Danielle M. Conway, “Intellectual Property: Implicit Racial and Gender Bias in Right of Publicity Cases and Intellectual Property Law Generally,” in *Implicit Racial Bias across the Law*, ed. Justin D. Levinson and Robert J. Smith (Cambridge: Cambridge University Press, 2012), 179–91.

patent” within or despite this legal background. This will lead to c) the significance the realm of patents acquired for the otherwise deprived Jews. It will be shown that as the patent law during the Nazi regime remained comparatively immune to racial categories, it became an area for strategies of economic survival by otherwise deprived Jews. The case study will be Walter Altmann, an owner of a textiles shop in Berlin and the inventor of a device for illuminating advertisements on postal letterboxes, which proved exceptionally popular in the early 1930s. In Germany after 1933, Altmann was defined as a Jew by the Nazis and therefore deprived of his rights. Following the liquidation of his business by the Nazis in 1938 he fled to France where he lived underground until, in 1944, he was arrested and deported to a concentration camp. He survived and later returned to Berlin to reclaim his textile shop.⁷

Reference to Jews in German Patent Law of the Nazi Period

At the onset of the Nazi regime, the German patent law of 1877, with its reform of 1891, was one of the most rigorous and prestigious acts of its time.⁸ In 1949, the chief of the patent section of the US Military Government for Germany in Berlin labeled the German patent system of the prewar period as “the finest in the world.”⁹ As pointed out above, alterations during the Nazi regime brought no radical breaks, but rather continuations of reform efforts initiated decades before, which conformed to international developments. National Socialist patent policy tried to find a balance between two opposite interests—the position of the individual inventor and that of the community, or *Volksgemeinschaft*—and did so by proclaiming a general commitment of property to the common good (*Gemeinwohlbindung des Eigentums*).¹⁰ It has often been noted that

⁷ Restitution claim by Walter Altmann, Landesarchiv Berlin, 23 WGA 81/57; and his autobiography, *Ohne das Lachen zu verlieren: Ein Berliner Überlebenstagebuch* (Berlin: Nolte, 1977).

⁸ Patent Law for the German Reich of 25 May 1877, *Reichsgesetzblatt (RGBl)* (1878): I, 60; Revised Patent Law of 7 April 1891, *RGBl* (1891): I, 79–90.

⁹ Richard Spencer, “The German Patent Office,” *Journal of the Patent Office Society* 31, no. 2 (1949): 84.

¹⁰ On this topic, see Michael Stolleis, *Gemeinwohlformeln im nationalsozialistischen Recht* (Berlin: J. Schweitzer, 1974).

Hitler himself was “inventor friendly,” possibly influenced by associations of employed engineers.¹¹ In accordance with this, major developments within patent law in the Nazi period concentrated on improving the position of the employee inventor, as in the introduction of the inventor principle in the patent law reform of 5 May 1936, or in the ordinances about inventions by members of the workforce of 1942 and 1943.¹² As Louis Pahlow has recently argued, another important characteristic of the Nazis’ patent policy was their tolerance of the larger process of integration and concentration of corporations in the first half of the twentieth century via patent pools.¹³ And during the Second World War, the predominant concerns within patent law were the issuing of enemy property ordinances in reaction to the Allied vesting of German industrial rights, and adaptations of the laws of German-occupied territories.¹⁴

A central development within Nazi patent policy regarding Jews in Germany after 1933 was the exclusion of patent attorneys and agents that fell under the racial categories. “Non-Aryan” patent attorneys had been banned from their professions in 1933 and 1938 by a special decree as part of a bundle of laws that purged alleged Jews from other occupational areas at the same time—first the civil servants, followed by physicians and lawyers.¹⁵ Apart from this, however, the patent law appears to have

¹¹ Seckelmann, “Der Dienst,” 251.

¹² These legal steps have been discussed in detail by Seckelmann, “Der Dienst”; Gispén, *Poems in Steel*, and Alexander K. Schmidt, *Erfinderprinzip und Erfinderpersönlichkeitsrecht im deutschen Patentrecht von 1877 bis 1936* (Tübingen: Mohr Siebeck, 2009).

¹³ Louis Pahlow, “Zwischen unternehmerischer Verwertung und internationaler Verflechtung: Zur Geschichte des Patentrechts in der ersten Hälfte des 20. Jahrhunderts,” *Zeitschrift für Geistiges Eigentum/Intellectual Property Journal* 4, no. 2 (2012): 186–215.

¹⁴ See Florian Mächtel, *Das Patentrecht im Krieg* (Tübingen: Mohr Siebeck, 2009).

¹⁵ *RGBl* (1933): I, 217; *RGBl* (1938): I, 1150; and Joseph Walk, ed., *Das Sonderrecht für die Juden im NS-Staat: Eine Sammlung der gesetzlichen Maßnahmen und Richtlinien* (Heidelberg: UTB, 1996), 240. See Maximilian Kinkeldey, “Der Ausschluß der Juden aus der Patentanwaltschaft in Deutschland 1933–1938” (PhD Thesis, Regensburg, 1997); and Martin Vogel, “Die Verfolgung der jüdischen Patentanwälte im Dritten Reich,” *Mitteilungen der deutschen Patentanwälte*, no. 2 (1995): 59–64. Evidently, the 1933 laws excluding “non-Aryan” civil servants, physicians and lawyers provided a good opening for opportunistic patent attorneys to request a ban on Jewish patent attorneys as well. The purge of Jewish patent attorneys created job vacancies and offered an opportunity to independent patent advocates to benefit from this. Such was the case of Hans Meissner, once chairman of the Association of Consulting Patent Engineers, who fervently denounced the privileged Jewish patent attorneys and became a patent attorney in 1934. On different patent professions, see Gispén, *Poems in Steel*, 158–59; for

remained void of references to Jews during the period of the Nazi regime. The new German patent law introduced in 1936—in roughly the same period when the regime enacted the “Nuremberg race laws,” a decisive step in the legalization of the social exclusion of Jews—did not contain explicit anti-Jewish elements. Nor did decrees published toward the end of the war, such as those mentioned above, make any explicit reference to the “racial” qualities of the right owners involved, and no law was implemented to hinder Jews from filing new patents. This is evident from the large number of published German patents from 1 January 1939 onward (after it had become compulsory for Jews to have as second name Israel or Sara), which include the prescribed second name “Israel.”¹⁶ We find Jews applying for patents up until the time of their deportation and even when imprisoned.¹⁷ One of many examples is Gustav Schwarzwald, owner of an important patent, trademark and utility model rights for the *Primeros* preservatives, who had been arrested for alleged tax evasion in 1937. From 1937 until 1941 he tried to file new patents and to transfer the old ones to his children, and was apparently aware of the threat to his life. Soon after the last and unsuccessful correspondence with the Reich patent office, he was deported to Auschwitz and died in December 1942.¹⁸ In his correspondence with the Reich Patent Office, his various rights to the patents (and trademarks) he owned are fully recognized.¹⁹

Hans Meissner, see *ibid.*, 159, 161. For Meissner’s promotion to patent attorney, see Bundesarchiv Berlin (BARCH), R 131, 555.

¹⁶ Second Decree on the Execution of the Law Regarding the Changing of Surnames and Forenames, 17 August 1938, *RGBl* (1938): I, 1044.

¹⁷ A search within the Espacenet-Database, for example, mentions thirty owners of German patents who bore the second name “Israel” between 1939 and 1945. E.g., patent DE722226, 16 April 1941, by Paul Israel Alexander. Alexander was deported in August 1942 to Theresienstadt, where he died on 5 September 1942. See his restitution case, Landesarchiv Berlin, 24WGA 1581/51; and the *Memorial Book for the Victims of the National Socialist Persecution of Jews in Germany* of the Bundesarchiv, <http://www.bundesarchiv.de/gedenkbuch/en1052969>.

¹⁸ For Gustav Schwarzwald, see BARCH, R 131, 417; and the *Memorial Book*, <http://www.bundesarchiv.de/gedenkbuch/en970747>.

¹⁹ It is remarkable that Raul Hilberg, when writing about different Nazi perpetrator types, described Herbert Kühnemann, a specialist in patent matters at the Reich Justice Ministry, as the bureaucratic desk perpetrator par excellence. See Gispén, *Poems in Steel*, 187; and Raul Hilberg, *Perpetrators, Victims, Bystanders: The Jewish Catastrophe, 1933–1945* (New York: HarperCollins, 1992), 30.

Thus, one cannot speak of a systematic exclusion of Jewish patent owners under German patent law.²⁰ However, conclusions drawn from the published legal texts alone ignore the basic characteristics of the law in the Nazi regime, in which, as Michael Stolleis and others have remarked, changes in law “were only in part changes in legislation,” and in which legislative texts allowed officials and judges much scope for “unrestrained interpretation.”²¹ In general, anti-Jewish measures were possible within the realms of already existing laws. The best-known example of this policy are the measures taken against capital flight that had existed before 1933 and were used to expropriate fleeing Jews in the following years without an explicit reference to Jews in the respective legal wording.²² As the regime’s anti-Jewish stance became more radical, the authorities increasingly resorted to internal, semi-official or oral orders.²³ As such, it is not surprising to find a note by the Reich Ministry of Justice to the Reich Patent Office informing it that, concerning “the *Judenfrage*,” as little as possible should be regulated by legal ordinances, and that administrative measures alone should be resorted to.²⁴ Moreover, German officials were aware of the international reaction to any published law in legal fields concerning international aspects (whereas purely national law, e.g., the adaptation of marriage laws as in the Blood Protection Law of 15 September 1935, in which marriages and sexual relations between Jews and non-Jews were prohibited, did not present similar problems). Finally, as Germany was dependent on foreign currency income from German

²⁰ Jan Schleusener similarly argues that there was no *systematic* policy concerning the property rights (“*Handlungs- und Verfügungsrechte*”) of Jewish traders. Jan Schleusener, *Eigentumspolitik im NS-Staat: Der staatliche Umgang mit Handlungs- und Verfügungsrechten über privates Eigentum 1933–1939* (Frankfurt: Peter Lang, 2007), 209.

²¹ Michael Stolleis, “Law and Lawyers Preparing the Holocaust,” *The Annual Review of Law and Social Science* 3 (2007): 216. “Unrestrained interpretation” refers to the classical study by Bernd Rüthers, *Die unbegrenzte Auslegung*, 7th ed. (Tübingen: Mohr Siebeck, 2012 [1968]), in which he pointed to the scope of interpretation for the juridical apparatus in Nazi law.

²² See Martin Friedenberger, *Fiskalische Ausplünderung: Die Berliner Steuer- und Finanzverwaltung und die jüdische Bevölkerung 1933–1945* (Berlin: Metropol Verlag, 2008), 67; and Christoph Franke, “Die Rolle der Devisenstellen bei der Enteignung der Juden,” in *Vor der Vernichtung: die staatliche Enteignung der Juden im Nationalsozialismus*, ed. Katharina Stengel (Frankfurt am Main: Campus, 2007), 81.

²³ Stolleis, *Law and Lawyers*, 216.

²⁴ Note by the Reich Ministry of Justice, n.d. (presumably July 1943), BARCH R 3001, 20626, fol. 280.

patents abroad and keen to avoid arousing foreign retaliation measures, aggressive measures concerning patent law were implemented only reluctantly. The German antienemy decrees during the Second World War against the British, American, Canadian, and other war parties were a reaction to similar measures on the part of the Allies, starting with the British Patents, Designs, Copyright and Trade Marks (Emergency) Act of 21 September 1939.²⁵

This said, we have at least one item of proof of anti-Jewish measures within the realm of patent law that would eventually have been issued as decree. Documentation from 1941 discusses the publication of an ordinance that was to deprive Jewish inventors of being named in public.²⁶ As mentioned above, the German patent law reform of 1936 had seen a reassessment of the personality rights of the inventor by introducing the concept of “inventor’s honor” (*Erfinderehre*).²⁷ This originated in efforts made by individuals who claimed a symbolic right to be named as inventors of the inventions they came up with while working for employers. By August 1942, however, Georg Klauer, president of the Reich Patent Office, informed the Reich Ministry of Justice about recent protest from within his office that this regulation would enable the few remaining Jewish inventors to receive this honor by being named in public.²⁸ In reaction to this protest, Franz Schlegelberger, who was responsible for the Reich Ministry of Justice, drafted a decree that would allow the president of the Reich Patent Office to decide individually which inventor’s names may be published.²⁹ However, in the turmoil of war, this decree was not implemented, and, given the small number of Jewish inventors still alive, it quickly lost significance. The majority of Jewish patent holders had either been able to flee or were deported and murdered in the Holocaust, and few Jewish inventors survived while having their businesses protected. From 1942 onward, no traces of new patent applications by Jews can be found.

²⁵ For the Allied and German anti-enemy decrees in detail, see Mächtel, *Das Patentrecht*, 356–61.

²⁶ Documentation in BARCH, R 3001, 20626. To my knowledge, the only scholar who has paid attention to this remarkable intervention is Margrit Seckelmann. See Seckelmann, “Der Dienst,” 256.

²⁷ For the concept of *Erfinderehre* see Schmidt, *Erfinderprinzip*.

²⁸ Note by Georg Klauer, president of the Reich Patent Office, 3 August 1942, BARCH R 3001, 20626, fol. 60.

²⁹ Letter from the Reich Ministry of Justice, 16 August 1942, *ibid.*, fol. 61–62.

In comparison with other legal fields in the Nazi regime, the discriminatory decree was imposed very late. Yet the correspondence between the Reich Ministry of Justice and the Reich Patent Office shows the extent to which and the way in which the anti-Jewish climate had reached the field of patent law, too. Interestingly, it was aimed not at the property aspects of the patent rights involved, but solely at the personality rights of the inventor.

The Treatment of “Jewish Patents” within the Given Patent Law

The legal patent corpus remained throughout the Nazi regime without any explicit anti-Jewish elements. Yet, given the state of law in the Nazi period, this does not automatically imply that the patent rights by Jews remained untouched. Rather, one should ask whether the existing positive patent law allowed discrimination of Jewish patent holders and to what extent these discriminations actually took place.

The case collection of restitution files for patent loss from survivors of the Holocaust at the Landesarchiv Berlin reveals that discriminations of Jewish patent right holders did indeed take place.³⁰ A sample of one hundred files shows ample room for maneuver for individual profiteers and a remarkable variety of exploitation, infringements, discrimination, appropriation and/or (mutual) profiteering in cases involving patent rights owned by Jews. The survivors' stories that were expressed in court after the war reveal detailed circumstances surrounding patent appropriations. Most of the patents of Holocaust survivors were lost as an effect of the persecution. Frequently, the victims claimed indemnification for patent *loss* (not confiscation or appropriation), as persecution in Nazi Germany had made it impossible for them to continue exploiting their patents. They pointed to the social exclusion they had faced and how this had made it increasingly difficult to find buyers for their inventions. If “lucky,” a potential buyer would agree to buy the rights far under their value. Or, when forced to flee or deported, the survivors had to leave laboratory equipment and patent documentation at home, from where they

³⁰ Landesarchiv Berlin, Restitution Offices Berlin (WGA), B Rep. 025.

were stolen or destroyed. These circumstances had made it impossible for them to pay their patent fees on time, which in turn caused the abandoned patent rights to lapse.³¹ In yet other cases, the survivors pointed to administrative measures leading to the lapse of patent and trademark rights, such as special ordinances for Jews that hindered the payment of their patent fees on time.³² Companies and research institutes could maintain Jewish scientists or technicians in employment for a limited period of time if their employer argued that their expertise was indispensable, and decided individually whether to remunerate their inventive contributions. The Zeiss factory, for example, employed several Jewish inventors despite their persecution by the Gestapo on the grounds that they were working on secret devices for the Wehrmacht. According to colleagues, one of these inventors, Otto Eppenstein, was still working for Zeiss until his death on 7 October 1942 following an agreement that his name would not be mentioned in connection with his work.³³ In comparable cases, mostly regarding Jewish employees at research institutions or companies, patents were published without naming the Jewish inventors.³⁴ § 36, Section 1, of the patent law of 1936 made it possible to apply to omit the inventor's name.³⁵ This regulation was now used to prevent Jewish inventors from being known in public, which is an example of anti-Jewish discrimination within the boundaries of the given law that was characteristic of the Nazi state.

³¹ E.g., DE709918, patent for a device to fade consecutive film scenes via a wipe transition, inventor and applicant: Hans Israel Pander, published on 17 July 1941. On 14 March 1943, the lapse of his patent was noted in the patent roll, as the sum for the patent's third and fourth year was outstanding. Nearly two months earlier, on 29 January 1943, Hans Pander had been deported to Auschwitz (*Memorial Book*, <http://www.bundesarchiv.de/gedenkbuch/en1130678>).

³² For orders on payment of patent fees for foreign patents by Jews, see, e.g., the decree by the Reich Ministry of Economy of 14 June 1938, Landesarchiv Berlin A Rep. 029, 287, fol. 541–42; and the decree by the Reich Ministry of Economy of 3 December 1938 in Walk, *Das Sonderrecht*, 262.

³³ Otto Eppenstein held eighty-six German and fifty-five US patents. For him and other Jewish employees at the Zeiss enterprise, see Carl Zeiss, *Die Geschichte eines Unternehmens*, vol. 2: 1905–1945, ed. W. Mühlfriedel and R. Walter (Cologne: Böhlau, 2000), 207–22.

³⁴ For the anonymous publication of newly issued patents by Jews, see Ute Deichmann, “Dem Duce, dem Tenno und unserem Führer ein dreifaches Sieg Heil: Die Deutsche Chemische Gesellschaft und der Verein deutscher Chemiker in der NS-Zeit,” in *Physiker zwischen Autonomie und Anpassung: Die Deutsche Physikalische Gesellschaft im Dritten Reich*, ed. D. Hoffmann and M. Walker (Weinheim: VCH, 2008), 479.

³⁵ *RGBl* (1936): I, 125.

In other cases, Jewish owners were urged to transfer their rights to someone else, for the decrees concerning “Jewish businesses” or “Jewish property” were considered to include patent rights as well. Requests to the Reich Patent Office from businesses that were involved in the “aryanization” of Jewish enterprises or interested in specific patents held by Jewish inventors were made from the mid-1930s onward.³⁶ On 28 August 1938, for example, Gustav Rheinberger, the owner of the Eduard Rheinberger AG shoe factory in Pirmasens, inquired at the Reich Patent Office which legal regulations had been implemented for the “transfer of patents from Jewish to Aryan ownership.” Following the pogrom of 9 November 1938 and the intensified measures to expropriate Jewish businesses, Rheinberger repeated his inquiry, assuming that “after the recent developments this issue would be settled as well.”³⁷ However, the Reich Patent Office’s answer was negative. Legal regulations according to which patents made by Jewish patent owners were to be transferred or deleted had “not yet” been issued. For the time being, the relevant regulation would be the Decree on the Utilization of Jewish Property of 3 December 1938, which allowed one to force “the owner of a Jewish business or a Jew in general” to sell his enterprise or certain assets within a defined time frame.³⁸ Judging from the files of the Reich Patent Office, a specific regulation concerning patent rights such as these was never issued. Yet requests like the one made by Rheinberger led to the statement by Göring cited at the beginning of this article. After discussing the issue with Hitler in December 1938, Göring clarified that “Jewish patents are property values and as such are to be Aryanized as well.”³⁹ This was interpreted as referring only to patents that

³⁶ Seckelmann gives an account of a comparable, albeit later, letter written by the Siemens-Schuckert-Aktiengesellschaft to the president of the Reich Patent Office on 10 September 1941, BARCH, R 131, Nr. 19. Seckelmann, “Der Dienst,” 256.

³⁷ Letter from Gustav Rheinberger, Schuhfabrik Eduard Rheinberger AG, 2 December 1938, to the Reich Patent Office, BARCH, R 131, 419.

³⁸ Letter from the president of the Reich Patent Office to Schuhfabrik Eduard Rheinberger AG, 14 January 1939, BARCH, R 131, 419. According to a handwritten note, the same letter was resent to make a similar inquiry half a year later. The mentioned decree is published in *RGBl* (1938): I, 1709.

³⁹ Kampe, *Emigration and Expulsion of German Jews*, 469. Another reason for the statement by Göring seems to have been the Austrian Anschluss, and the remarkable scope of patent aryanizations in Vienna. See Andreas Kern, “Arisierte Patente: Jüdische ErfinderInnenentschick-sale im Nationalsozialismus” (Diploma thesis, University of Vienna, 2012).

belonged to a Jewish firm and that had been transferred to a non-Jewish holder.⁴⁰ In accordance with what the Reich patent official had explained, the above-mentioned decree of 3 December 1938 provided a basis for the transfer of patents that were property of a “Jewish business” in the context of the company’s aryanization.⁴¹ The question whether we can speak of proper “patent aryanization” in these cases depends on how broadly we define this term.⁴²

It is notable that the letters of the Rheinberger shoe factory and the statement by Göring do not refer to patents held in private ownership by independent inventors. The case of the Jewish independent inventor Walter Altmann shows what could happen in such a case within the boundaries of the given patent law. It also enables us to suggest possible explanations (on the basis of correspondence from the files of the Reich patent office) as to why patents owned by Jews were not vested on a large and systematic scale. Before 1933, his illuminating device for advertisements on post boxes had aroused the interest of the Reich Post Ministry and later the SA and SS. Altmann transferred his patent rights for the device to a befriended “Aryan” nominee. A company was founded within the SS with the task of marketing and producing the post box, which ensured that the device was installed across Germany in numbers reaching tens of thousands. The Jewishness of the inventor of the highly praised “real national German product” was either carefully concealed or remained unknown to businessmen. However, the company soon went bankrupt because illuminated advertisements could not be used during the war.⁴³

⁴⁰ US Consul Joel C. Hudson, “Executory Regulations for the Removal of Jews from Wholesale Trade and Industry, 7 March 1939,” in *The Holocaust*, vol. 4: *Propaganda and Aryanization, 1938–1944*, ed. John Mendelsohn (New York: Garland, 1982), 284.

⁴¹ A known case regarding company owned intellectual property is related by Götz Aly and M. Sontheimer, *Fromms: Wie der jüdische Kondomfabrikant Julius F. unter die deutschen Räuber fiel* (Frankfurt am Main: S. Fischer, 2007), 89, 196.

⁴² For the different uses of the term “aryanisation,” in recent scholarship, see Maren Janetzko, Review of Christof Biggeleben et al., eds., “*Arisierung*” in *Berlin*, and Monika Gibas et al., eds., “*Arisierung*” in *Leipzig: Annäherung an ein lange verdrängtes Kapitel der Stadtgeschichte der Jahre 1933 bis 1945*, in *H-Soz-u-Kult*, H-Net Reviews, February 2008, www.h-net.org/reviews/showrev.php?id=22316.

⁴³ “Briefkästen werben,” *Berliner Stadtblatt*, 16 June 1934, 1. On the company, see Hermann Kaienburg, *Die Wirtschaft der SS* (Berlin: Metropol, 2003), 212–19. The author is apparently not aware of the “Jewish origin” of the patent.

While the SS company tried to reverse the decline in the war-restricted German advertising industry, Walter Altmann had gone into exile in France. Here, he further developed his devices and adapted them to local circumstances. Thus, we find a refined version of his letterbox in a French patent of 1944.⁴⁴ This application, modeled on the German forerunner, was regarded by the Nazis as an unauthorized “transfer of Jewish patents.” In fact, patent transfers by escaped Jews played a significant role in industrial and Nazi circles. As is well-known, prewar Nazi policy had, in general, two contradictory elements. On the one hand, Jews were encouraged to flee. On the other hand, leaving the country was only allowed after a series of complex and expensive bureaucratic procedures. Permits and visas must be obtained, a “capital flight tax” and other levies paid, and, most importantly, less and less tangible property could be taken abroad.⁴⁵ While the authorities initially tried to secure the most important valuables of the refugees, a few loopholes remained. Martin Dean, for example, noted that fleeing Jews bought expensive photographic equipment for resale once in exile for which there was, as yet, no legal prohibition. This loophole was soon noticed by officials and closed.⁴⁶ A different case, it seems, were patent rights, for they remained unnoticed by the German foreign exchange offices until a comparatively late date. It is not until the “Measures against Capital Flight” under the Foreign Currency Law of 12 December 1938 that proceeds and earnings from industrial property rights are listed among those assets that fall under special restrictions when emigrating.⁴⁷ By comparison, earnings from copyrights had already been

⁴⁴ FR 908136, 6.6.1944.

⁴⁵ For the gradual prohibitions of transfer assets, see the overview by Rolf Banken, “Das nationalsozialistische Devisenrecht,” in *Wirtschaftssteuerung durch Recht: Studien zur Entwicklung des Wirtschaftsrechts im Interventionsstaat des ‘Dritten Reichs’*, ed. J. Bähr and R. Banken (Frankfurt am Main: Klostermann, 2005), 200ff.

⁴⁶ Dean, *Robbing the Jews*, 64–65. The transfer of assets by Jewish refugees has recently received considerable scholarly attention. Martin Dean, for example, discussed the efforts and partial successes of multinational Jewish enterprises in transferring their capital in the face of the Nazi expropriation program. See Martin Dean, “Multinational Jewish Business and the Transfer of Capital Abroad in the Face of ‘Aryanization,’” in *European Business, Dictatorship and Political Risk, 1920–1945*, ed. C. Kobrak and P. Hansen (New York: Berghahn Books, 2004), 103–21.

⁴⁷ *RGBl* (1938): I, 1741–42. Chapter IV, § 56, Sections 2 and 3 relates to the proceeds and earnings from industrial rights.

placed under regulations in 1936.⁴⁸ In 1939, a US report noted confidentially that “in innumerable instances” Jewish patent holders had been able to “take their patent rights with them abroad.... In one case alone, the loss has amounted to more than twelve million reichmarks to the advantage of an English firm.”⁴⁹ These patent transfers led to the unwelcome “transfer of industries abroad” (so-called *Industrierverschleppung*).⁵⁰ Technically, the notion of patent transfer referred to the possibility of emigrating without having been deprived of one’s patent rights. In certain cases of “aryanizations,” sales contracts did not mention patents held in private ownership by Jewish businessmen or company properties. It is difficult to know whether the patent rights were simply neglected or deliberately left to the Jewish owner.⁵¹ Another form of transfer was to buy patents while still in Germany and take the documentation, as apparently the value of patent documents was not recognized for a certain time. In January 1940, the Main Finance Office in Berlin raised this issue for the first time.⁵² Most commonly, however, “patent transfer” simply referred to refugees who resorted to their foreign patents from abroad.

In 1939, and in reaction to warnings by non-Jewish patent lawyers about the loss of national currency via such patent transfers, the foreign exchange offices tried to tighten their control of the patent rights of Jewish emigrants. On 3 August 1939, in response to a rather alarmed letter by the patent lawyer Georg Respondek, the Foreign Exchange Office of the Main Finance President Berlin pointed to the fact that industrial rights or earnings had to be included in the forms for the declaration of property that the emigrants had to fill out. It assured that, if an emigrant owned a patent right, the economic group (*Wirtschaftsgruppe*) in charge of the patent class would prove whether the Reich would lose currency by letting the emigrant transfer the right. Such cases had become rare. Yet at this point, a considerable number of patent holders had already been able to

⁴⁸ *RGBl* (1936): I, 467.

⁴⁹ Hudson, “Executory Regulations,” 285.

⁵⁰ See, e.g., note by a member of the Reich Patent Office, 6.1.1940, BARCH, R 586, fol. 126.

⁵¹ See, for example, the restitution case by Robert Abrahamson vs. Heinrich List, Landesarchiv Berlin, 2 WGA 228/49; and the restitution case of his son Edmund Abrahamson for the right to use his patent rights, Landesarchiv Berlin, 22 WGA 628/67.

⁵² BARCH, R 131, 586, fol. 124-128, 130.

emigrate. The official acknowledged that Jews who had already emigrated had been able to apply their patent rights from abroad.⁵³

It is still not clear how many Jewish patent holders who managed to emigrate were able make use of their patents in exile. The continual interest shown by Nazi authorities in this issue, and its treatment in German-Jewish circles suggest that opportunities offered by patent law to transfer property or to establish a new livelihood abroad were indeed considerable and not purely the product of Nazi paranoia.

What made these patent transfers possible above all, was the fact that it was difficult to identify Jewish holders of industrial property rights. However, it was easier to track down those Jews who had fled the country and had been expropriated on the grounds of “capital flight,” many of whom held industrial property rights. From the mid-1930s onward, finance offices relied on the cooperation of the Reich Patent Office in order to identify industrial property rights of fugitives.⁵⁴ For instance, by 1937, Reich patent officials were ordered to search through all published tax warrants and to establish lists of people who held patent or trademark rights, and to inform the local finance offices of these assets.⁵⁵ Thus, the files of the Reich Patent Office contain roughly thirty cases of Jewish patent owners who fled. In these cases, care was taken to explicitly include the patent rights in the general confiscation of the refugees’ assets.

Apart from these cases, the Nazi authorities had only limited means to identify Jewish patent holders. Despite what many people thought at the time, patent law did not require people to inform the Reich Patent Office of license agreements once the patent had been granted and the applicant and owner had been noted in the patent roll.⁵⁶ Hence, the information contained in the patent roll about the ownership of patents

⁵³ Letter by the Foreign Exchange Office of the Main Finance President to the Reich Patent Office, 3 August 1939, BARCH, R 131, 586, fol. 118–19.

⁵⁴ See the correspondence between the Reich Patent Office and regional finance offices in the files of the Reich Patent Office, e.g., in BARCH, R 131, 418.

⁵⁵ In 1937, however, this measure was abandoned after the department for patent transfers complained about work overload and after a survey to establish whether these reports had been helpful for the finance offices to secure valuable property proved to be ineffective. BARCH, R 131, 418.

⁵⁶ In contrast to licensing, a new *owner* of the patent right had to be noted in the patent roll; see § 24, Section 2 of the patent law of 1936, *RGBl* (1936): I, 122–23.

was imprecise and did not reveal the patent's actual usage.⁵⁷ The Foreign Exchange Board of the Main Finance Office in Berlin, members of the Reich Justice ministry, the president of the Reich Patent Office and patent lawyers discussed at length what measures could be taken to counter the loss of patent capital via emigrating Jews.⁵⁸ Finance officials urged greater control of Jewish patent rights, but the Reich Patent Office informed them that it was difficult to identify whether the current owner of an industrial right was Jewish or not. As the head of the department for patent transfers emphasized, one could not ask for proof of Aryan ancestors of the applicants.⁵⁹ Only those Jews who filed patents after 1 January 1939, who were recognized on account of the prescribed second name "Israel," could be identified and would be reported to the finance offices. In addition, from early 1940 onward, all patent transfers in which one participant was suspected to be Jewish, were to be reported.⁶⁰ Finally, even if a Jewish patent holder could be identified, the German authorities could only operate within the national borders. "Unfortunately," no foreign industrial rights by Jews could be vested in Germany on legal grounds, wrote a German patent and trademarks specialist in 1940.⁶¹ In the 1930s it was common to apply for patent protection in as many countries as possible and as far as this was affordable, especially if license agreements with foreign or multinational companies were involved. Countries in which Walter Altmann held patents included Germany, Austria, Switzerland, Luxembourg, France, Belgium, the Netherlands, Great Britain, the USA, and Canada. Of these, only the German ones were affected.

⁵⁷ Note by Franke, 31 August 1939, BARCH, R 131 586, fol. 119.

⁵⁸ See various files in BARCH, R 131, 586.

⁵⁹ Note by Franke, 31 August 1939, BARCH, R 131 586, fol. 119.

⁶⁰ Letter from Georg Klauer to the Fachgruppe Textilmaschinen der Wirtschaftsgruppe Maschinenbau Chemnitz, 11 April 1940, BARCH, R 131, 175. See also the report on patent transfer of Julius Fromm: BARCH, R 131, 586.

⁶¹ Correspondence regarding Glass/Wohlgemuth, n.d., 1940. Political Archives of the German Foreign Office, R 43723.

Opportunities for Safeguarding Rights

As the interactions between the Reich patent office, the finance offices, the justice ministry and patent lawyers show, the possibilities within the given positive German patent law to vest and exploit “Jewish patents” on a large scale were limited. This meant that the legal position of Jewish patent holders remained largely unaffected at a time when their agency had otherwise been severely cut down by discriminating laws. In turn, the field of patenting emerged as an area for legal and economic survival strategies for Jews, counteracting the process of destruction of their economic basis.⁶²

First, there was the above-mentioned transfer of patents. Escaped Jews could rely on their foreign patents in exile, and in the face of immediate persecution, having maintained a patent right could mean a lot. The Jewish chemist Herbert Appel, for example, who was banned in 1933 from his academic position at the University of Leipzig, managed to sell a patent for the manufacture of ascorbic acid to a Swiss company. From the proceeds he could survive a year in Switzerland and further pay for a journey to Great Britain.⁶³ In surprisingly frequent cases, patents from the late 1930s up until the war can show precisely the place of refuge of Jewish inventors, the routes they took, and how they, like Walter Altmann, tried to adapt their inventions to local circumstances. Second, impoverished Jews, who had not been involved with patents before, recognized the opportunities they had as holders of patent rights and began to engage in tinkering with or marketing inventions.⁶⁴ Despite the many legal and economic pitfalls of marketing a patent, deprived Jews resorted to this cumbersome improvisation in order to provide an income for themselves and their families, no matter how tiny. German Jewish ex-patent lawyers now provided aid

⁶² The room for maneuver for Jewish company holders in counteracting the process of “aryanisation” or liquidation has been analyzed in depth by Christoph Kreutzmüller, *Ausverkauf: Die Vernichtung der jüdischen Gewerbetätigkeit in Berlin 1930–1945* (Berlin: Metropol Verlag, 2012); and C. Kreutzmüller, B. Nietzel and I. Loose, “Nazi Persecution and Strategies for Survival: Jewish Businesses in Berlin, Frankfurt am Main and Breslau, 1933–1942,” *Yad Vashem Studies* 39, no. 1 (2011), 31–70.

⁶³ Letter by R. Robinson, 23 October 1934, Bodleian Library Oxford, Society for the Protection of Science and Learning, MS.208.

⁶⁴ See the advertisements offering patent rights for sale or license in German Jewish newspapers from the late 1930s onward, e.g., *Jüdisches Nachrichtenblatt* Prag, no. 21 (1940): 4; and *Central-Verein-Zeitung. Allgemeine Zeitung des Judentums*, 2 June 1938.

to inexperienced Jewish tinkerers and warned of exaggerated hopes. Julius Seligsohn, for example, a lawyer at the Reichsvertretung der Juden in Deutschland (the umbrella organization of German Jews since 1933) and the son of the well-known patent expert Arnold Seligsohn, complained in May 1938 in the newspaper of the Central-Verein Deutscher Staatsbürger Jüdischen Glaubens, the *Central-Verein-Zeitung*, about the

people who have only now, under the circumstances of emigration and new life circumstances, come into contact with inventing.... [They sometimes simply] spread out on the table a sketch or model of the invention.... [They wish] to purchase and ask how good it is and if it will make a profit in exile.... A responsible attorney can't give an answer to this question.⁶⁵

Pauperized Jews sometimes desperately tried to sell an invention to survive for another period of time, mostly continuing their attempts from places of exile. They were not always successful. As can be expected, it could be extremely hard to market an invention in a foreign environment, as what had been profitable in one country's market could prove worthless in the other.⁶⁶ War restrictions put further obstacles in the way. In Great Britain and the United States, German-Jewish inventors could be regarded as German citizens, although they had been deprived of their German citizenship by one of the respective decrees from 1933 up until the Eleventh Decree to the Reich Citizenship Law of 25 November 1941.⁶⁷ Being regarded as "enemy aliens" meant that their patent rights could be confiscated even more quickly by the Allied government than by the Nazi state.⁶⁸

⁶⁵ Julius L. Seligsohn, "Patent und Auswanderer," *Central-Verein-Zeitung. Allgemeine Zeitung des Judentums* 17/18 (1938): 19.

⁶⁶ See correspondence by Ludwig Neumann about his unsuccessful efforts to file a patent for a rubber hose-pipe in the UK in the 1940s, Wiener Library, MF 1023/1/34.

⁶⁷ *RGBl* (1941): I, 722.

⁶⁸ See Helen B. Junz, "Problems Regarding the Search for the Holocaust Area Assets in the USA," in *Revisiting the National Socialist Legacy: Coming to Terms with Forced Labor, Expropriation, Compensation, Restitution*, ed. Oliver Rathkolb (New Brunswick: Transaction Publishers 2004), 162.

Conclusion

Judging from these first findings, patent law remained comparatively “neutral” toward racial policy and the persecution of Jews. The patent system during the Nazi period was clearly “highly technical and thoroughly standardized, and whose ability to function the regime was unable or unwilling to interfere with ... [and which was] subjected to much less pressure” than other legal fields.⁶⁹ In turn, its relative stability offered Jewish patent holders room for maneuver to maintain some of their rights and to survive economically for a limited period of time. Yet, even in this seemingly neutral legal realm, the persecution of Jews had repercussions. It is to be noted that, following the increased radicalization of the regime’s anti-Jewish policy, (at least) one amendment per decree to the patent law was indeed discussed, though not implemented. Most importantly, in the general climate of persecution, Jewish patent holders were increasingly threatened. Within the scope of the positive patent law, the officials of the Reich Patent Office did cooperate with other institutions of the Nazi state in order to identify and control the intellectual property of the deprived Jews, thus participating to an extent in the expropriation of Jewish assets. A side effect of their general discrimination was that Jewish owners of patent rights were heavily pressured into forced sales of their patents, administratively obstructed from the payment of patent fees, and prohibited from acting as patent agents and consultants. As such, patent protection was indirectly undermined with regards to a specific group of persons despite the fact that, on the surface of the legal corpus, their status as right owners with full patent protection remained intact.

⁶⁹ Stolleis, *Law and Layers*, 216.

PART II

Socialism: Copyright between System and Defiance

Copyright in the German Democratic Republic and the International Copyright Regime

MATTHIAS WIESSNER

Introduction

The history of the German Democratic Republic (GDR) can be placed within the “dual” comparative historical context of both its western sibling, the increasingly affluent and genuinely democratic Federal Republic of Germany (FRG), and those of Eastern European states that shared the fate of Soviet supremacy and the attendant radical restructuring of politics and society. In terms of law and policy governing intellectual property, and more specifically, copyright law, the GDR drew heavily on its heritage of German civil law.

This can be seen in copyright provisions made by the socialists, which lean heavily on the legal traditions of Western Europe, including, notably, consistent recognition for the moral rights of the author. The socialist approach took the unique cultural perspectives of Eastern European countries into consideration as well as the political ideology of socialism and the structure of a socialist nation-state, all of which influenced the character and content of the law on copyright, its organizations and legal proceedings.

This chapter examines the GDR copyright policy and its role as an important element of the country’s cultural policy and describes its attitude toward the international copyright regime from the state’s foundation in 1949 up to the early 1970s. The chapter addresses the ideas and strategies of politicians and experts in the GDR, the role of individual member states of the Berne Convention for the Protection of Literary and Artistic Works (the “Berne Convention”) in relation to the GDR, the position of the administration of the Berne Convention, the Berne Office, and institutional structures in the field of copyright in the GDR. I will

start this essay with an outline of the history and the character of GDR copyright law and its place in the development of economics, politics and culture within a socialist society. A treatment of the Berne Convention as applied to the German situation after World War II will follow. I will continue with a description of the GDR's attitude toward international copyright in the 1950s (exemplified by the Thomas Mann Case), the controversy surrounding the Berne Convention and the GDR's attempts to join the convention during the 1950s and 1960s and an outline of its struggle for full acknowledgment. This, I will argue, can be seen as both an example of the success of the West German "Hallstein Doctrine"¹ and of the politicization of an international agreement such as the Berne Convention in the era following World War II.

Copyright in the German Democratic Republic

The GDR's original constitution of 1949 referred to and guaranteed² the rights of East German authors, as did the later, revised versions of 1968 and 1974: "The mental work, the right of authors, inventors and artists enjoys the protection, the promotion and the welfare service of the republic."³ On the one hand, the inclusion of these rights in the constitution acknowledges their social, political and thus their ideological value. On the other hand, however, the intellectual property rights of the individual in state-socialist societies of the twentieth century were constantly questioned. The rights of the society, of the nation and of the collective continually accrued greater regard and power, consistent with Marxist-Leninist

¹ The "Hallstein Doctrine" was a key concept of the foreign policy of the FRG from 1955 until the early 1970s. It implied that the Federal Republic would not establish or maintain diplomatic relations with any state that recognized the GDR. See William Glenn Gray, *Germany's Cold War: The Global Campaign to Isolate East Germany, 1949–1969* (Chapel Hill: University of North Carolina Press, 2003), 81–86.

² GDR constitutional law and constitutional legal practice differed considerably. See Peter W. Sperlich, *The East German Social Courts: Law and Popular Justice in a Marxist-Leninist Society* (London: Greenwood, 2007), 109.

³ Constitution of the GDR (1949), Article 22, 3. Similar but shorter: "The right of authors and inventors enjoys the protection of the socialist state." Constitution of the GDR (1968 and 1974), Article 11, 2. See Amos Jenkins Peaslee, *Constitutions of Nations, Vol. III: Europe*. Revised 3rd ed. (Hague: Martinus Nijhoff, 1974), 331–56.

theory. It was argued that the people are the collective creator of knowledge and should therefore have easy access to knowledge and culture. Intellectual works were often seen in socialist societies as the result of a social process rather than as a creation that could be attributed to an individual. Creativity was perceived as having been designed for the good of all and, ultimately, as a prerequisite to society's grand plan for cultural growth.⁴

Let us take a brief look at the state of German copyright law in the middle of the twentieth century. The zonal division after the end of World War II ultimately led to the founding of two German states in 1949. It became necessary in both states to return to the attempts, started in the 1930s, to reform German copyright law. In East and West Germany, the old copyright laws had been in effect since the beginning of the twentieth century⁵ and were in place until 1965.⁶ However, technological innovations, such as radio, television, and photocopiers, that started to emerge at the beginning of the twentieth century and were still increasing in number by the middle of the century, prompted a critical need for the codification of intellectual property law. There was a further driving force behind the GDR government's wish to reform the copyright laws. The party leaders' aim was to gradually transform the old "bourgeois laws" into new laws based on socialist ideology and the new allocation of power and property. Most other Eastern Bloc countries had established such new copyright acts before the end of the 1950s.⁷

In 1958 the East German Copyright Law Review Committee (later the Copyright Law Reform Commission) started legislative work on a new copyright law. As the result of a state-ruled process and discussions within different authors' organizations and specialized journals, a new

⁴Heinz Püschel, "Copyright in the German Democratic Republic," *Copyright Bulletin* 10, no. 3 (1976): 19.

⁵The Act concerning Copyright in Literary and Musical Works of 1901, *Reichsgesetzblatt (RGBl)* 27 (1901): 227; the Act on Copyright for Visual Arts and Photography of 1907, *RGBl* 3 (1907): 7; and the Law on Publishing Rights of 1901, *RGBl* 27 (1901): 217.

⁶With regard to the legal situation at that time in the GDR, see Ernst Kämmler, *Das geltende Urheber- und Verlagsrecht der Deutschen Demokratischen Republik* (Leipzig: Verlag für Buch- u. Bibliothekswesen, 1956).

⁷For example, the Bulgarian law of 12 November 1951, the Polish law of 10 July 1952, and the Romanian law of 18 June 1956.

East German copyright act was passed in 1965.⁸ Compared to the new patent law, which had been passed in 1950, the new copyright act had taken a fairly long time to form and be passed. The patent law was meant to serve as a matrix for numerous inventions and innovations and represented an important element of the industrial development policy in the new East German state. The legislative commission responsible for the preparation of the draft copyright law answered not to the Ministry of Justice but rather to the Ministry of Culture because copyright was viewed as an instrument for the management of the cultural processes necessary to form a developed socialist society.⁹ Responsibility for patent law, on the other hand, lay with the Ministry of Planning¹⁰ because it was part of economic planning; therefore, literature, music, and other art forms became an official part of government cultural policy and planning.¹¹

Before the new copyright act, model contracts, such as the standard publishing contract for authors of literary works, had been enacted for the principal categories of works in the 1950s.¹² These model contracts, negotiated and approved by the authors' societies and the Ministry of Culture, regulated the remuneration of authors, i.e., the relationship between author and publishing house, based on conditions in Germany during the interwar years as well as on Soviet maxims.¹³ The author's fees were also regulated by the state. The aim of the model contracts was to strengthen the authors' position and to transform the copyright conditions and bring them in line with the changed political and economic situation in a centrally planned economy.

⁸ Gesetz über das Urheberrecht (DDR) vom 13. September 1965, *Gesetzblatt (GBl)* I, 209.

⁹ Püschel, "Copyright in the German Democratic Republic," 19.

¹⁰ The Ministry of Planning was responsible for directing the planning work in the GDR and for the control of the "Five Year Plan." The ministry was converted into the State Planning Commission and placed under the jurisdiction of the Council of Ministers in November 1950. See Willi Albers, ed., *Dictionary of Economics* (Stuttgart: Fischer 1980), vol. 8, 740.

¹¹ Matthias Wießner, "Das Patentrecht der DDR," in *Geschichte des deutschen Patentrechts*, ed. Martin Otto (Tübingen: Mohr Siebeck, 2015), 239–88.

¹² See Ernst Kaemmel, "The new Model Contracts," *Der Autor: Zeitschrift des Schutzverbandes Deutscher Autoren e.V.* 1 (1952): 4–16. For published contracts, see also A. Glücksmann and H. Püschel, eds., *Urheberrecht* (Leipzig: Bibliographisches Institut, 1975), 443ff.

¹³ For a detailed survey of authors' contracts in the Soviet Union, see Serge L. Levitsky, *Introduction to Soviet Copyright Law* (Leyden: Brill Archive, 1964), 142–70.

Since the eighteenth century, the development of intellectual property rights has been characterized by tensions between “private” and “public” interests, the rights of the individual creator/owner against those of society as a whole. It has also been influenced by the forces driving internationalization and the geographical spread of intellectual property rights. Given the demands of the new ideology, politics and new laws concerning ownership in the GDR, the socialist society had to negotiate new regulations pertaining to the rights of authors, reproducers, distributors, and users.

Amendments to copyright legislation created a major conflict for the experts: prompted by their experiences during the interwar years, they sought to improve the legal status of the creative artist. But at the same time they wanted to increase the rights of use for the people, the users, in accordance with the model of socialist society. Part of the socialist theory was the identification of interests: of the individual and society, of the citizen and the state, of the Communist Party and the people, in short, equality and harmony in all social relations.¹⁴ But the harmonization of individual and societal interests remained theoretical and was in reality enforced through repressive state action and the system that connected every part of society with the ruling Communist Party: the Socialist Unity Party of Germany (SED).

The GDR legal experts included rights of exploitation and moral rights (*droit moral*) in their concept of uniform copyright and no distinction was made between these two rights. Heinz Püschel, professor of law at the Humboldt University of Berlin and one of the central figures in the story of copyright legislation in the GDR, regarded them as pure personal rights.¹⁵ The Copyright Act of 1965 referred to “individual copyright as a socialist right to personality” (§13). This incorporated the new entity of socialist copyright and the new position of the author within socialist society.

From the beginning of its existence, the GDR compared its economic and cultural development with that of the capitalist West and especially with that of West Germany. Most GDR politicians believed that intellectual

¹⁴ Sperlich, *The East German Social Courts*, 8. During the 1970s and 1980s many intellectuals placed greater emphasis on the individual, their needs and interests. It was increasingly recognized that conflicts could exist between the individual and society in GDR socialism.

¹⁵ Heinz Püschel, “Das subjektive Urheberrecht als sozialistisches Persönlichkeitsrecht,” *Wissenschaftliche Zeitschrift der Humboldt-Universität zu Berlin, Gesellschafts- und Sprachwissenschaftliche Reihe* 15 (1966): 801.

property rights were an essential prerequisite for cultural and economic prosperity in socialistic society, too, and thus considered the question of intellectual property rights as an important one for long-term economic survival. The GDR leaders wanted to protect their creative artists because they needed them to produce cultural goods.¹⁶ Culture is one of the key components involved in nation building, thus new socialist artistic works or cultural goods were to help create a new East German nation,¹⁷ a socialist nation, distinct from the bourgeois West German republic. They were to help establish an East German socialist identity, which would be manifestly different from the West German capitalist identity while sharing key characteristics with other socialist states. The objective of the GDR cultural policy was to increase the social and economic returns from the arts, culture, and creative works. The copyright system should encourage writers and artists to be creative for the benefit of socialism and for the people. The East German economic and copyright experts considered copyright law to directly affect and promote a broad range of cultural activity. The concept of copyright having an incentive function took priority over the competing goal of disseminating all works easily to the public.

The GDR legal experts rejected the term “intellectual property,” which they considered to be bourgeois, as well as the commodification of art works.¹⁸ This politically and ideologically motivated criticism marked a break (or attempted to create the public impression of such a break) with the past and with the German and West European copyright traditions. Yet indeed, if we take a closer look at the Copyright Act of 1965 and the debates around that subject, it can be argued that the act was merely the further development of the bourgeois theory under the “cloak of socialism.”¹⁹

¹⁶ Manuela Beck, “Literaten im Nationwerdungsprozess der SBZ, DDR 1945–1953” (PhD diss., University of Bremen, 2000), 39; David Pike, *The Politics of Culture in Soviet-Occupied Germany, 1945–1949* (Stanford: Stanford University Press, 1992), 285; Püschel, “Das subjektive Urheberrecht.”

¹⁷ Joanna McKay, *The Official Concept of the Nation in the Former GDR: Theory, Pragmatism and the Search for Legitimacy* (Aldershot: Ashgate, 1998).

¹⁸ Heinz Püschel, “Die Ideologie des Geistigen Eigentums und das sozialistische Urheberrecht der DDR,” *Staat und Recht* 16 (1967): 1589–1604.

¹⁹ Arthur Wandtke, “Zu einigen theoretischen Grundlagen des Urheberrechts in der DDR—Historischer Einblick,” in *Historische Studien zum Urheberrecht in Europa*, ed., Elmar Wadle (Berlin: Duncker und Humblot, 1993), 226.

Without the socialist-phrased preamble of the Copyright Act of 1965, the copyright law on its own does not reveal a radical change from Western copyright traditions: there was more continuity than difference. The law largely followed the German traditions and the regulations of the Berne Convention, e.g., the fifty-year period of copyright protection *post mortem auctoris* (p.m.a.): after the author's death. The salient points of the remuneration system were retained and therefore a partly market-orientated²⁰ model to finance creative works.

Article 11 of the GDR constitution stated that “the use of property as well as of author and inventor rights must not be in conflict with the interests of society.”²¹ But what were the interests of the socialist society (or state) and who was going to define and articulate them? Thus, for a final evaluation of GDR copyright it is necessary to analyze the application, the institutional framing, and the utilization of the law and its organizations. The framework within which copyright had to function should also be taken into consideration. It should be noted that the more important issues for authors and creators concerned the conditions and circumstances of production, exploitation and distribution of their works and not the regulation or application of copyright law. We have to recall the conditions under which authors lived and worked in the GDR: printing and publishing and the entertainment industry had been nationalized and centralized. Professional organizations, like the “Writers’ Association” or the “Association of German Composers,” were ruled and supervised by the Socialist Unity Party, which was *de facto* the state. State-ruled agencies had exclusive decision-making powers concerning the import and export of cultural goods. For cross-border transfers of a works’ property rights, a new procedure was introduced involving compulsory mediation by the Copyright Bureau. This agency was founded by decree from the GDR Ministry of Culture in 1956.²² It was charged with exercising the

²⁰ However, the GDR was a planned economy. The “socialist market,” for example, in book production and book trade was shaped by ideology and most of the East German media business was state owned. Prices were not determined by the market and decisions were based on administrative and political criteria rather than on supply and demand. For an economic history of the GDR, see André Steiner, *The Plans That Failed: An Economic History of the GDR* (New York: Berghahn, 2010).

²¹ Constitution of the GDR 1968 and 1974, Article 11, 3.

²² Anordnung über die Errichtung eines Büros für Urheberrechte, see *GBI* II, 14 November 1956, 365–66.

state monopoly on foreign trade in copyrights. The Copyright Bureau determined whether a book might be published in foreign countries and in so doing, fulfilled a specific role within the censorship apparatus. This was part of an entire ensemble of institutions aimed at monitoring the foreign trade of books and other cultural goods and of exerting different methods of control.²³

Only by taking this into account can we accurately interpret what the East German copyright law or copyright system meant for the authors' right to publish, reproduce, disseminate, and publicly perform or exhibit the results of their creative activity.

The Thomas Mann Case in 1952

The case of the unlawful publishing of books written by Thomas Mann illustrates key issues concerning the relationships between copyright protection, public domain claims and access to culture and knowledge, international copyright regimes and national cultural policy in Eastern Germany. The Thomas Mann Case of 1952 marked a major attempt to disregard international copyright laws and German copyright law existing at that time.

At the beginning of the 1950s, some GDR politicians, such as Walter Ulbricht, wanted to adopt the same position as the Soviets with regard to the Berne Convention. The recognition of legal protection of trade and intellectual property was of secondary importance. The state-owned Aufbau-Verlag, the main literary publisher in East Germany, founded in 1945 in Berlin, released a "pirate" edition of the works of Hermann Hesse and Thomas Mann without authorization by the authors or S. Fischer Verlag, the publishing house that held the rights.

The GDR Ministry of Culture had allowed that books from Western countries whose authors and publishers did not enter into contracts involving payments in the nonconvertible GDR currency would still be published for the good of their people. They wanted to make German

²³ For a brief overview of book censorship in the GDR, see S. Klötzer and S. Lokatis, "Criticism and Censorship," in *Dictatorship as Experience: Towards a Socio-Cultural History of the GDR*, ed. Konrad H. Jarausch (Oxford: Berghahn, 1999), esp. 251–63.

“humanistic” literature available and inexpensive²⁴ to their people, whose thinking had been corrupted by the Nazi propaganda machine.²⁵

Thomas Mann protested against copyright infringements in a letter to Walter Janka, the head of Aufbau-Verlag: “Your idealism and your maxim ‘the people’s education above all’ makes me sick because you combine this good intention with actions through which your publishing house places itself” at the level of pirates.²⁶ However, the GDR’s cultural politicians insisted that far from their actions being to the detriment of the author’s rights, they were in fact for the benefit of the author, assuring a wider dissemination of his work.

This situation had been caused, in part, by the legalistic approach taken by Mann’s publisher, Gottfried Bermann Fischer,²⁷ and his insistence on hard-currency transfer of at least a proportion of the royalties, a measure to which, because of persistent shortage of Western currencies in the GDR, the East German authorities in the end could not agree. The famous publisher Gottfried Bermann Fischer stressed the importance of properly securing copyright, while Mann was prepared to accept almost any conditions, even royalties held in blocked ostmark accounts, if only the great demand for his books in East Germany could be satisfied.²⁸

Bermann Fischer criticized this unlicensed publication in a letter to the Writers’ Association and branded it a “pirate edition” and, moreover, filed a copyright infringement suit against the publishing house at the East Berlin regional court. The court stated in its judgment that the West German

²⁴ The old argument against copyright—that it increases the cost of books—refers back to the times of pirate book reprints around 1800. During the 1960s and 1970s, e.g., at the Stockholm Conference in 1967, the cost of translation, licensing, and copyright was again an issue for the developing countries.

²⁵ Reeducation, in Soviet diction “antifascist, democratic reeducation,” was important in the Soviet zone and in the GDR as well. Writers like Thomas and Heinrich Mann, Hermann Hesse and other “bourgeois humanists” represented the humanist and progressive traditions of German history and literature. Throughout the 1950s and 1960s, cultural officials saw the humanist heritage, as embodied in the works of the Weimar classic period, as the model for renewal in the GDR. See Silke von der Emde, *Entering History: Feminist Dialogues in Irntraud Morgner’s Prose* (Oxford: P. Lang, 2004), 42.

²⁶ Hermann Kurzke, *Thomas Mann: Life as a Work of Art: A Biography* (Princeton: Princeton University Press, 2002), 514.

²⁷ On Thomas Mann and his publisher Gottfried Bermann Fischer see, e.g., Kurzke (2002), 440 and Thomas Mann, *Briefwechsel mit seinem Verleger Gottfried Bermann Fischer: 1932–1955* (Frankfurt am Main: Fischer, 1973).

²⁸ Donald A. Prater, *Thomas Mann: A Life* (Oxford: Oxford University Press, 1995), 456.

publishing company could not claim any copyright protection in the GDR, because of the “unachievable conditions” (the unusually high price) for the licenses of Mann’s books. Other reasons given by the court were the contravention of the principles of the Potsdam Agreement and the constitution of the GDR and the “misuse of a prevalent claim to copyright.”²⁹

The committee for legal affairs of the East German Writers’ Association in Berlin concurred and legalized the unlicensed publication by Aufbau-Verlag, justifying it for “cultural reasons.” Thus, all other considerations had to be put aside. The protest by the S. Fischer Verlag house had to be rejected, especially because “literature was always a common property of the whole people, which may not be denied to certain parts of the nation.”³⁰

S. Fischer Verlag and Aufbau-Verlag did finally arrange a license agreement based on payments in East German currency. Thomas Mann received a leather-bound edition of the “Joseph” trilogy from Aufbau-Verlag and, as a special gift for his birthday in 1954, a fur coat.³¹ One year later he was given a complete twelve-volume edition of his works by Aufbau-Verlag in time for his eightieth birthday on 6 June 1955.

The legal dispute with Bermann-Fischer had an impact on the GDR’s position with regards to the Berne Convention. Publishing foreign books without licenses was incompatible with the rules of the convention. As a consequence of the financial problems caused by their lack of convertible currency some GDR lawyers, such as Georg Münzer or Friedrich Karl Kaul, and some politicians, opposed the Berne Convention and payments to publishing houses in Western countries.³² Friedrich Karl Kaul, legal advisor at the Berliner Rundfunk radio station, argued against the Berne Convention in an official statement in summer 1953.³³ Kaul stressed that due to the deep antagonism and irreconcilability between socialism and

²⁹ LG Berlin, Urteil, 7 August 1952–54, Q 12/52, *Neue Justiz* (1952): 557.

³⁰ Legal commission of the Writers’ Association, Archive of the Academy of Art (Akademie der Künste–AdK), SV (alt) 1136.

³¹ Walter Janka, “Report about the Visit of Thomas Mann, 24 May 1954,” *AdK*, SV 372, 64.

³² Georg Münzer, legal adviser at the state commission of art (Stakuko), expressed this position in a letter to the secretariat of the Socialist Unity Party in December 1952; see BArch DR 1/5862, Bl. 77.

³³ Political Archive of the German Federal Foreign Office (PA AA), GDR Ministry of Foreign Affairs (MfAA), A 7916, 5.

capitalism there could be no ideological or cultural-political coexistence. The enemy, the Federal Republic of Germany, would only exploit any such attempt at peaceful coexistence and turn it against the GDR.

The Berne Convention and the New Political Situation after World War II

From its inception in the 1880s international copyright protection had been a significant point of transnational cooperation between states and diverse nongovernmental stakeholders in cultural and economic affairs. Its aim was to regulate the book trade, translation rights and the transfer of rights across national borders and strengthen national cultural economies. The international governance of intellectual property rights was determined by the cross-border diffusion and reception of cultural works across the different cultural, political and scientific fields of reference for the benefit of producers, exploiters and users.³⁴ The twentieth century was marked by serious efforts to find transnational and globally applicable standards for copyright protection. The aim was to widen the scope of international copyright protection, to strengthen the rights of authors and publishers and to enlarge the geographical scope of copyright.³⁵ To realize these aims, the Berne Union had an open structure, which allowed adjustment for technical innovations and for the admission of new member states. Hence, unanimous agreement was an important instrument, preventing individual member states from dominating.³⁶

National authors' and publishers' interest groups had maintained the Berne Union in cooperation with national governments throughout the war.³⁷ A revision conference was overdue after having already been

³⁴ Isabella Löhr, "The Propertisation and Internationalisation of Culture in the 20th Century," *Comparativ* 21, no. 2 (2011): 29–45 (special issue: *Intellectual Property Rights and Globalization*, ed. Isabella Löhr and Hannes Siegrist).

³⁵ Ibid.

³⁶ Madeleine Herren, "Governmental Internationalism and the Beginning of a New World Order in the Late Nineteenth Century," in *The Mechanics of Internationalism: Culture, Society, and Politics from the 1840s to the First World War*, ed. M. H. Geyer and J. Paulmann (Oxford: Oxford University Press, 2001), 142.

³⁷ Isabella Löhr, "Geistiges Eigentum in Kriegszeiten. Der Schutz von Urheberrechten und die Berner Übereinkunft im Ersten und Zweiten Weltkrieg," *Comparativ* 16, no. 5/6 (2006): 234–48 (special issue: *Entgrenzung des Eigentums in modernen Gesellschaften und Rechtskulturen*, ed.

postponed due to World War II.³⁸ In addition to the improvement of its legal principles and their embodiment in the member states' national policies, one lasting aim was geographical extension. The geopolitical situation had drastically changed after World War II. Furthermore, the emerging decolonization process was creating a large number of newly independent states, notably in Africa and Asia.³⁹ Cold War diplomacy also affected virtually all levels of international negotiations and politics, and the Berne Convention was not immune to this. Lastly, it had to solve problems related to international law and disapproval of the legal and political situation in states such as fascist Spain and South Africa, states, which consequently were refused invitations to meetings of the union institutions.⁴⁰ The GDR was one of these problems. The geopolitical change gave foreign policy stakeholders more influence in the decision-making process than before. This becomes evident in the way in which the Berne Office dealt with the GDR.

The GDR Decision in Favor of the Berne Convention

The International Unified Office in Berne⁴¹ was the institutional point of contact for member states of the Berne and Paris Conventions. Experts and professional associations guaranteed a permanent discussion of current problems concerning international protection of intellectual property.⁴²

By the autumn of 1949, the Berne Office had already commenced activities relating to the newly founded GDR. It had an ongoing interest

H. Siegrist); Bénigne Mentha, "Berne Convention," in *World Copyright: An Encyclopedia*, ed. H. L. Pinner (Leyden: A. W. Sijthoff, 1953), 1069; Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886–1986* (London: Kluwer, 1987), 98.

³⁸ The Brussels Conference for the Revision of the Berne Convention in 1948, *ibid.*, 106.

³⁹ Sam Ricketson and Jane C. Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, Vol. 2: *Other Conventions on Copyright and Neighbouring Rights*. 2nd ed. (Oxford: Oxford University Press, 2006), 885.

⁴⁰ *Ibid.*, 1157.

⁴¹ Initially there were two secretariats (one for industrial property, one for copyright). In 1893 they were united and moved from Berne to Geneva in 1960.

⁴² Joseph Eked-Samnik, *L'Organisation Mondiale de la Propriété Intellectuelle (OMPI)* (Brussels: É. Bruylant, 1975).

in increasing the geographical scope of application for union contracts. The office had written a letter to the president of the East German “Office for Inventions”⁴³ concerning the position of the GDR, expressing the hope that the GDR would abide by the existing conventions and issue a declaration to this effect. This would be “appreciated very much.”⁴⁴ Evidence of the uncertainty felt by foreign copyright experts regarding GDR membership is confirmed by statements made by Paul Abel and H. L. Pinner: “The question whether the Eastern zone (under Russian occupation) is still part of the International Copyright Union must be left open. There is no official note from the Government of this zone.”⁴⁵

In the early postwar years, legal disarray resulting from the partial repeal of National Socialist law created uncertainty about the validity of copyright laws and international copyright standards in East and West Germany. This concerned not only the Berne Convention, but also the Treaty on Literary and Artistic Property, signed in Montevideo on 11 January 1889,⁴⁶ and the 1892 bilateral treaty between Germany and the USA.⁴⁷ Evidence suggested that the war had had little lasting effect upon copyright treaties, and thus the position was taken that the above-mentioned conventions had merely been suspended during wartime, that their legal existence was not affected and that the validity of the Berne Convention was not fundamentally in question for Germany.⁴⁸ The German Publishers and Booksellers Association in Leipzig was very much engaged with copyright matters. Its archives contain many contemporary letters from

⁴³ The forerunner of the later founded Amt für Erfindungs- und Patentwesen der DDR, the GDR Patent Office.

⁴⁴ Request from the Bureau International pour la Protection de la Propriété, 8.11.1949, PA AA, MfAA, A 6161, 103.

⁴⁵ Untitled article by Paul Abel in *Le droit d'auteur*, no. 6 (1950): 66; H. L. Pinner, *World Copyright: An Encyclopedia* (Leyden: A. W. Sijthoff, 1953), 35.

⁴⁶ Germany had joined the treaty in 1927, at the same time as Argentina, Bolivia, and Paraguay. For the Montevideo Convention, see Ricketson and Ginsburg, *International Copyright and Neighbouring Rights*, 1171.

⁴⁷ For the Agreement of 15 January 1892 between the German Reich and the United States of America on the mutual protection of author's rights, see Wilhelm Nordemann, “The Term of Protection for Works of American Authors in Germany,” *Journal of the Copyright Society of the USA* 44, no. 1 (1996): 1–7.

⁴⁸ Kurt Runge, “Die Revidierte Berner Übereinkunft zum Schutze von Werken der Literatur und Kunst in Kriegs- und Nachkriegszeit,” *GRUR*, no. 1 (1948): 31–35; “L'Union Internationale au Seuil de 1950,” *Le droit d'auteur* 63, no. 1 (1950): 4.

publishers and others on the current status of international copyright at that time. The association publicly declared that the Berne Convention was not invalidated or annulled because of the war.⁴⁹

In February 1950 in a communiqué to the chief of the Allied High Commission, Federal Chancellor Konrad Adenauer had declared the “unrestricted application” of the Berne Convention (Rome Act) for the “area of the Federal Republic of Germany.”⁵⁰

East German politicians had to decide whether the newly founded GDR should also issue such a statement and officially accept the rules of international copyright. The Soviet Union refused to participate in the multilateral Berne Convention, which, in their view, was a bastion of bourgeois legal concepts established by the capitalist monopolies to increase protection solely of their own intellectual property.⁵¹ This obviously raised the question of whether the GDR and other socialist countries were to follow the Soviet example and stop the geographical expansion of the international copyright regime at the border of the Soviet Bloc, or whether the GDR and other countries, like Czechoslovakia, Poland, or Hungary, should maintain their own, more Western, legal traditions.

The decision-making process was hampered by the lack of experienced copyright professionals in the GDR at this time.⁵² The GDR administration did not come to a decision as quickly as the FRG government. In 1952 the GDR sent letters to other Eastern Bloc countries—Poland, Hungary, Romania, Czechoslovakia, and Bulgaria—requesting clarification of their position with regard to the Berne Union.⁵³ All these countries answered

⁴⁹ Max Freyer, “Der gegenwärtige Stand des internationalen Urheberrechts,” *Börsenblatt für den Deutschen Buchhandel* 122, no. 29 (1955): 516–20.

⁵⁰ *GRUR* 52 (1950), 412f.

⁵¹ Katlijn Malfiet, “Introduction,” in *Intellectual Property in the Russian Federation: A System in Transition*, ed. M. Elst and K. Malfiet (Brussels: Bruylant, 1994), 23. The Soviets maintained this position until the end of the 1960s. For a more positive Soviet perspective toward multilateral agreements in the field of copyright at the end of the 1980s, see Mark M. Boguslavskij, *Private International Law: The Soviet Approach* (Dordrecht: Martinus Nijhoff Publishers, 1988), 169–73.

⁵² Hermann Wentker claims that a general deprofessionalization in the area of justice took place during the early years of the GDR. See Hermann Wentker, *Justiz in der SBZ/DDR 1945–1953* (Munich: Oldenburg, 2001), 4; Ute Schneider, “Socialist Legal Experts: A New Profession?,” in *Experts in Science and Society*, ed. Elke Kurz-Milcke (New York: Kluwer Academic/Plenum Publishers, 2004), 66.

⁵³ Statements of the countries. See PA AA, MfAA, A 7916, 12–14.

that they wished to keep their membership, with the exception of Bulgaria, which planned to examine the possibility of cancelling its membership.⁵⁴ Thus, the enforcement of new, socialist copyright law in the GDR met considerable opposition. Some copyright experts fought especially hard for the normalization of international relations and those between the two Germanys in the area of copyright, i.e., the recognition and fulfillment of the obligations toward West German and other foreign creators and exploiters of works.

Politicians were not the only ones who had reservations about the Berne Convention due to domestic and financial considerations. Some copyright experts also rejected the terms of the Berne Convention during the early 1950s. They had to take into account not only cultural policy aspects, but also financial or economic aspects and the foreign policy situation. The de facto autocracy of the Socialist Unity Party meant that the party also controlled all fundamental decisions on the area of foreign policy. The relevant state authorities had to translate these decisions into local policy. In the officially published literature about copyright there is not a single word about the discussion that took place behind the scenes. The disaccord in the decision-making process was hidden from the public and can be found only in the archival sources.

The GDR was faced with the question of whether it should remain as a member of the Berne Union, formally withdraw from it, or simply not carry out the obligations derived from it. The collapse of the Third Reich raised the question of whether the German Reich's successor state would continue Germany's commitment to existing treaties. Should and could the GDR follow the example of the FRG and join international organizations or other multilateral treaties of which the Reich had previously been a member?

The GDR maintained that now there were two different new states in Germany, both successor states to the German Reich.⁵⁵ Yet the GDR had only been recognized by members of the Soviet Bloc, while Western countries considered the creation of the GDR by the Soviet Union a breach of

⁵⁴ Ibid., 7.

⁵⁵ Donald M. McRae, ed., *Canadian Yearbook of International Law* 2005, vol. 43 (Vancouver: UBC Press, 2006), 431.

the Soviets' obligations to Germany after the Second World War, which rendered the GDR's legitimacy as a state extremely doubtful in the eyes of international law.⁵⁶ The FRG government issued a statement in reaction to the founding of the GDR in which it proclaimed its sole right to represent German interests. The three Western allies supported this position. The West's refusal to accept the second German state did not, however, stop East Berlin from trying to establish itself within the international political system.

In May 1955, the GDR government forwarded a memorandum to the International Office of the Berne Union, stating that the Berne Copyright Convention (Rome Act) was "again applicable" in its territory and in its relations with other parties to the convention, claiming to resume the previous membership of the former German Empire.⁵⁷ It is important to bear in mind that during the Cold War succession to treaties was one of the most disputed and difficult areas of public international law.⁵⁸ Accordingly, the question of which German state was the successor to the treaty obligations of the former German Reich was a highly contentious one. In his study of the Berne Convention from 1987, Sam Ricketson noted, "it does not seem that any argument of this kind has arisen directly in the context of the Berne Union."⁵⁹ But the declaration of reapplication by the GDR was verifiably derived from state succession under international law.⁶⁰

⁵⁶ In most cases, the establishment of a new state or government was not a breach of international law; as there was, and still is, no general rule of international law which forbids a group of people from founding a new state. The existence of a state or government was simply a question of fact, and recognition or nonrecognition usually had no legal effects. The prevailing view of today is that recognition is declaratory and does not create a state. See P. Malanczuk and M. Barton Akehurst, *Akehurst's Modern Introduction to International Law* (London: Routledge, 1997), 84.

⁵⁷ This is noted differently in Ricketson and Ginsburg, *International Copyright and Neighbouring Rights*, 1133: "It does not seem that GDR has ever claimed identity with pre-1945 Germany."

⁵⁸ F. A. Mann, "Germany's Present Legal Status Revisited," *International & Comparative Law Quarterly* (ICLQ) 16 (1967): 760–99; Jochen Abr Frowein, "Legal Problems of the German Ostpolitik," *ICLQ* 23 (1974): 105–26; Dieter Papenfuß, "The Fate of the International Treaties of the GDR within the Framework of German Unification," *American Journal of International Law* 92 (1998): 469–88.

⁵⁹ Ricketson, *The Berne Convention*, 811.

⁶⁰ H. Fellhauer and E. Winklbauer, "Die internationale Organisation für geistiges Eigentum (IPO) und das Universalitätsprinzip," *Deutsche Außenpolitik* 12 (1967): 346; Heinz Püschel, *Internationales Urheberrecht* (Berlin: Staatsverlag der Deutschen Demokratischen Republik, 1982), 36, and the cited literature.

Thus, in the second half of the 1950s, the GDR leadership also attempted to gain official recognition by making a declaration of succession to numerous treaties. International organizations provided the ideal framework for such a strategy of recognition seeking, as they were based on equal participation of all members, they facilitated the exchange of information, and offered routine negotiating processes.⁶¹ As membership in the UN was a primary foreign policy goal of the GDR they reasoned that securing admission to as many international organizations as possible would serve as a significant step toward this final goal. In total, the GDR Ministry of Foreign Affairs examined 129 old conventions for their suitability and subsequently declared in 1959 that 57 of these contracts were again applicable.⁶² At the same time, the GDR also confirmed once more that the Berne Union was “for the time being in force.”⁶³

The GDR’s diplomatic note concerning the Berne Convention arrived at the Swiss Political Department in July 1955 through the legation of the Czechoslovak Republic in Berne. In a note issued through its legations, the Swiss government informed all signatories of the Berne Convention about the application of the GDR. The Berne Office asked the GDR authorities in a letter⁶⁴ to which date its note referred: to that of the foundation of the GDR (1949) or to that of the note, i.e., May 1955. The GDR authorities decided some years later that the GDR committed to the Rome Act from 1949 onward.⁶⁵

⁶¹ Helga Haftendorn, *Coming of Age: German Foreign Policy since 1945* (Lanham: Rowman & Littlefield, 2006), 127.

⁶² R. Amberg and E. Harhammer, “Zur Wiederverwendung von Konventionen durch die Deutsche Demokratische Republik,” *Deutsche Außenpolitik* 4 (1959): 765; list of reapplications: *Gesetzblatt* 1959 I, 505f.

⁶³ Declaration see: *German Foreign Policy* 6 (1967): 169.

⁶⁴ Jaques Secrétan (BIRPI director, 1953–57) to government secretary Fritz Apelt (Ministry of Culture) on 23 September 1955, PA AA, MfAA, A 6165, 82.

⁶⁵ The most important GDR copyright expert, Heinz Püschel, wrote in 1988 that “the GDR has been a member of the Berne Union since its foundation in 1949.” Heinz Püschel, “Die Berner Konvention und sozialistisches Urheberrecht,” in *Centenaire de la Convention de Berne et 60 ans de la législation sur le droit d’auteur en Pologne*, ed. J. Szwaja and J. Serda (Warsaw: Nakładem uniwersytetu jagiellońskiego, 1988), 50.

The Prevention of Active Membership and the “Hallstein Doctrine”

Every small step taken by the GDR toward international recognition was carefully monitored by the FRG. The task of blocking East Germany's admission to international organizations and international treaties required considerable effort. Immediately after the note from the GDR government concerning the renewed applicability of the Rome version of the Berne Convention, the Foreign Office of the FRG in Bonn quickly informed all its embassies in Berne Union member states. The reaction of the Swiss government was under particular scrutiny as it had forwarded the diplomatic note from the GDR to the convention member states. This could easily be understood as *de facto* recognition of the GDR.⁶⁶ Adenauer's government strenuously maintained its claim to sole legitimate representation for all of Germany and insisted that the members should reject the GDR application. The representatives of the Federal Republic replied that it was the only freely elected and legal German government and that it was entitled to represent international matters for the whole of Germany. It insisted categorically that “Eastern Germany” was not and could not become a member of the Berne Union. FRG foreign politicians assumed that the GDR had purposefully selected a treaty to which the USA was not a signatory, in order to avoid confrontation on that front.⁶⁷ On the basis of international nonrecognition of the GDR and the “Hallstein Doctrine” of the Federal Republic, most members of the Berne Convention followed the West German request and refused to acknowledge the GDR declaration.⁶⁸

In 1967, the GDR Ministry of Foreign Affairs requested an evaluation by legal experts in order to verify the GDR's legal position. It appointed two

⁶⁶ The FRG attempted to intensively influence the Swiss government on this matter. See Swiss Federal Archives, E 2003(A) 1978/29, Bd. 269 and PA AA, B 84, nr. 685.

⁶⁷ Federal Minister of Justice to the Federal Ministry of Foreign Affairs, August 1955, PA AA, B 84 nr. 233, vol. 1.

⁶⁸ An example: The following text was part of the reply, sent on 12 November 1955, by the government of the UK to the Swiss legation in London upon receiving the GDR note: “[We are] concerned that the Berne Copyright Convention was again being applied in the territory of the Soviet Zone,... Her Majesty's Government do not recognise the German authorities in the Soviet Zone of Germany as a Government nor do they recognise that territory as a State. Mr. Macmillan regrets that they are therefore unable to take cognisance of the enclosures to His Excellency's Note under reference,” *Le droit d'auteur* 70 (1957): 173.

copyright experts and two experts in international law: two East Germans and two Westerners. The East German experts, Peter-Alfons Steiniger and Hans Nathan, a Swiss copyright expert, Anton Troller, and a Belgian expert in international law, Heinz Rollin, all argued that the GDR was a member of the Berne Union and therefore also entitled to attend the Stockholm Conference.⁶⁹

Like many in the Western world, the representatives of the Berne Office had political reservations regarding the GDR. Nevertheless, they remained relatively neutral and kept in mind their aim to secure a geographic expansion of the Berne Convention.⁷⁰ A delegation from the GDR visited the Berne Office in spring 1956 and requested a seat on the Permanent Committee, which, since the Brussels Conference, had reserved only one seat for Germany. The Berne Office reacted positively.⁷¹ It had accepted the visit of the small GDR delegation “with sympathy” and had, in principle, no objections. However, it requested that the GDR should first negotiate this issue with the Federal Republic. The GDR Ministry of Foreign Affairs rejected this.

The Berne Office refused to take a clear position. It regularly referred to the fact that the question of membership of the “two Germanys” and the use of all rights of membership, e.g., a seat on the Permanent Committee, or the question of payment of membership fees, should be solved in an international diplomatic conference. The Berne Office could not risk a total normalization of relations with the GDR and the full recognition of its membership because of the political pressure by the Federal Republic, which was an important and economically strong member country.

The West German copyright expert Eugen Ulmer suggested in 1957 that he represent the GDR on the permanent committee, because at that time the GDR was not able to take advantage of its own membership. The proposal was recommended by both East German copyright experts, Anselm

⁶⁹ H. Rolin and A. Troller, “Gutachten über die Mitgliedschaft der DDR in den internationalen Konventionen für den gewerblichen Rechtsschutz und den Schutz der Urheberschaft,” *Staat und Recht* 16, no. 8 (1967): 1288–93.

⁷⁰ Most of the employees had a Swiss background. See Georges Béguin, *L'Organisation des Bureaux Internationaux Réunis pour la Protection de la Propriété Industrielle, Littéraire et Artistique* (Geneva: Bureaux internationaux réunis pour la protection de la propriété industrielle, littéraire et artistique, 1961), 21.

⁷¹ Hans Pischner (Ministry of Culture) to MfAA 10 July 1956, PA AA, MfAA, A 6164, 23.

Glücksmann⁷² and Georg Münzer,⁷³ but was not approved by the Ministry of Foreign Affairs. Their officials argued “the GDR is a full member of the Berne Convention and cannot be represented by the Federal Republic.”⁷⁴

In the annual reports by the Berne Office, the GDR would not be registered as an independent and full member of the convention for nearly two decades. The members’ list of 1960 mentions only “Germany” as a member. The international copyright expert H.L. Pinner even went so far as to write that the GDR had not joined any international copyright convention, just like the Soviet Union and the People’s Republic of China.⁷⁵

The reports by the Berne Office from 1966 and 1968 listed “Germany (Fed. Rep.)” with the footnote: “Also the German Democratic Republic (or East Germany), but the member states disagree on this point, in view of the legal status of this territory.”⁷⁶ In the members’ list of 1972 the GDR was registered as “German Democratic Republic,” with the footnote: “The members of the [Berne] Union disagree on the question of whether the German Democratic Republic is a member of the [Berne] Union.”⁷⁷

Internal regulations by the director of the Berne Union defined the correct terms to be used when referring to the GDR in official documents. An internal memorandum from the director decreed that only “German Democratic Republic” should be used as a name and not “expressions, like East Germany, Soviet zone or others.”⁷⁸ In cases where the prescribed term was not used, the word “entity” was suggested rather than “territory,” “zone” or “state.” A footnote under the state name should either make clear that the United International Bureaux for the Protection of Intellectual Property (BIRPI)⁷⁹ did not want to take a position regarding the legal

⁷² Legal adviser to several GDR publishing houses as well as to the “Association of the Composers and Musicologists” and the “Filmmakers Association” of the GDR.

⁷³ Legal expert for the Ministry of Culture.

⁷⁴ MfAA, Department of International Organizations, PA AA, MfAA, C 6164, 4.

⁷⁵ H. L. Pinner, “The Copyright Position of Eastern Literature in Western Countries,” *Russian Technical Literature* 3 (1962): 2–5. Paul Abel mentioned Pinner in his “Correspondence Letter from Great Britain,” *Le droit d’auteur* 76 (1963): 60.

⁷⁶ General Information of the United Internat. Bureaux for the Protection of IP, Geneva, different years, V.

⁷⁷ Ibid.

⁷⁸ BIRPI, Internal Memorandum, 26 January 1970, PA AA, MfAA, C 442–77, 295.

⁷⁹ An international organization established in 1893 to administer the Berne Convention.

situation of this “entity,” or that the Berne Union members did not agree whether this “entity” was a member of the union or not.⁸⁰

On the other hand, it is hard to maintain that the GDR was not a “country” in the sense of the convention and therefore capable of being a member. There were (and are) no specific qualifications for membership in the Berne Union. But in reality, the validity of membership had to be accepted by the other members of the union. In the case of the GDR, twenty-five members were unwilling to accept the GDR declaration and accordingly, no member country, whether they had objected or not, was obliged to treat the GDR as a member. On the other hand, the GDR’s declaration provided a basis on which member countries that had not objected to its membership could regulate their relations with the GDR.

In any event, there was no discrimination of the GDR in terms of practical copyright protection. The discrimination existed “merely” in the refusal to extend to the GDR the full rights enjoyed by members of the organization.⁸¹ The GDR correctly fulfilled its material-legal obligations of membership and paid its membership fees. However, until 1972 the GDR membership fees were deposited in a special account at a Swiss bank.⁸²

The situation of nonrecognition existed until the “Ostpolitik” of Chancellor Brandt led to a normalization of relations between the two Germanys. From the beginning of the 1970s, an increasing number of Berne Union members began to accept the GDR. Thus in 1973, the GDR was mentioned as a fully accepted member, without qualification, as the “German Democratic Republic, bound by the Rome Act (1928).”⁸³ The recognition of the GDR by the Western powers in 1973 had a constitutive effect: recognition rectified the illegality of the GDR’s origins and transformed the GDR from a legal nullity into a widely accepted state.⁸⁴

⁸⁰ The same problem arose with the GDR membership in the WIPO. See Eked-Samnik, *L'organisation mondiale de la propriété intellectuelle (OMPI)*, 78–82. The GDR sent an application for admission to the WIPO General Director on 10 June 1968.

⁸¹ Report by Georg Münzer, 7 April 1967, PA AA, MfAA, C 1738/72, 71–73.

⁸² Fellhauer and Winklbauer, “Die internationale Organisation für geistiges Eigentum (IPO) und das Universalitätsprinzip,” 350; Report, FRG Ministry of Foreign Affairs, 1970, PA AA, B 84 Nr. 683, 4.

⁸³ General Information of the United International Bureaux for the Protection of IP, Geneva 1973, V.

⁸⁴ Malanczuk and Barton Akehurst, *Akehurst's Modern Introduction*, 83f.; Georg Ress, “Germany, Legal Status after the Second World War,” in *Encyclopedia of Public International Law* (Amsterdam: North Holland Pub. Co., 1995), vol. 2, 567–581.

The Reasons for Membership of the Berne Convention

The production and distribution of cultural goods and rights could be handled by the legal standards and doctrines of the individual state. But books, music, and works of art were also objects of international trade. For the GDR politicians, economists and copyright experts the question arose as to how to handle works that fell outside the national monopoly on rights and, vice versa, how foreign works ought to be handled, exploited and appropriated within the territory of the state. The GDR wanted to trade their cultural goods and, at the same time, urgently needed foreign intellectual products, technical literature in particular. The cross-border trade in books and other printed works had already forced European national governments to address matters of international law in the opening decades of the nineteenth century. The GDR wanted to join the world economic scene and, for cultural business relations (for example, to participate in the international trade in books) engagement with international copyright law was crucial. Before the Second World War, Germany had been one of the leading cultural exporters. The GDR sought to follow this tradition and wanted to export cultural goods, not only from an economic point of view but also for political reasons. After the war, the East German publishing industry recovered quickly, with increasing growth rates during the 1950s.⁸⁵

An important point in favor of applying to the Berne Convention and becoming a full member resulted from the resolution to monitor the national media market. On this issue, Georg Münzer presented to Deputy Minister for Culture Erich Wendt⁸⁶ the argument that not applying the Berne Convention would make it easier to “offer Western cultural products. In this case we would have to use different, mostly administrative, procedures to prevent their distribution, which would require a very

⁸⁵ Sigfred Taubert, *Über das Verlagswesen in der Bundesrepublik, in Berlin und in der sowjetischen Besatzungszone* (Frankfurt a. M.: Börsenverein Deutscher Verleger- und Buchhändler-Verbände, 1953); Ernst Umlauff, *Der Wiederaufbau des Buchhandels. Beiträge zur Geschichte des Büchermarktes in Westdeutschland nach 1945* (Frankfurt a. M.: Buchhändler-Vereinigung, 1978).

⁸⁶ Erich Wendt (1902–1965) was the director of Aufbau-Verlag Berlin shortly after its establishment. Between 1957 and 1965 he was deputy minister and later state secretary in the Ministry for Culture.

complicated control system.”⁸⁷ He highlighted that with membership of the Berne Convention and by adhering to international copyright principles, one had an “economic tool” and referred to the fact that “each use would require an explicit transfer of rights,” which, in turn, would “result in foreign currency obligations.” In this way, one could “handle more easily and more clearly the application and authorization requirement.”⁸⁸

The discussions about the form of copyright law and membership of the Berne Union were followed closely not only by the Ministry of Foreign Affairs and the Ministry of Culture, but also the Ministry of Finance, which carefully checked the financial consequences of certain decisions. Emphasis was placed on the fact that a renewed application of the Berne Convention and a legal improvement in the situation for authors internationally would generate costs in Western currencies. However, it would mean that the GDR could finally have a positive influence on international cultural exchanges.⁸⁹

The GDR and the 1967 Revision Conference in Stockholm

In 1967, the Berne Union members convened in Stockholm. The Berne International Office and the Swedish government had jointly organized the meeting. The member states made significant improvements in authors’ rights and improved the union’s infrastructure. Many of the new Berne Union members were developing countries that had achieved their independence in the years immediately following World War II. These developing countries required a broad spectrum of knowledge, literary and artistic resources, and they demanded special concessions from the developed countries, such as compulsory licenses for translation and

⁸⁷ Letter from Georg Münzer to Erich Wendt, *Verordnung zur Erweiterung des Urheberrechts. Brüsseler Fassung der Berner Übereinkunft*, 3. 4. 1958, German Federal Archiv (BArch), DR1/15.653.

⁸⁸ For citations, see *ibid.*

⁸⁹ Georg Münzer on the GDR membership of the Berne Union. Report on an inquiry of the Soviet Ministry of Culture, 1966, BArch, DR1/7265, 106–8.

shorter terms of protection.⁹⁰ They had the general support of the socialist countries.

The GDR was not invited to participate in the revision conference of the Berne Convention in Stockholm in 1967,⁹¹ which was indicative of the effect of the “Hallstein Doctrine” and the political and economic power of the Federal Republic. The government of the FRG had urged most of the Berne Union members to prevent an invitation being extended to the GDR during the years before the conference.⁹² The diplomatic negotiations with Stockholm supporting the invitation of an official GDR delegation failed in spite of several attempts by different Eastern Bloc countries and the Soviet Union. Furthermore, the International Office ignored all East German complaints and referred the GDR to the government of Sweden, which was responsible for the organization of the conference and the invitations. GDR politicians involved in foreign affairs were especially disappointed by the position of the (politically neutral) Swedish government. After all, East German foreign policy had made concerted efforts to initiate special trade relations with, and receive political recognition by, neutral European countries such as Finland, Switzerland, and Sweden.⁹³

Finally, the president of the GDR Office for Inventions and Patents, Joachim Hemmerling, joined the conference not as a delegate of the GDR government, but as a delegate of the “Council for Mutual Economic Assistance,”⁹⁴ a role in which he could not speak officially on behalf of the GDR. As usual in such cases, the GDR Ministry of Culture and the Ministry of Foreign Affairs had tried to get information and official documents about the preparations of the Stockholm conference through its embassies in the Eastern Bloc countries (above all, the USSR, Poland, and Hungary). Although the GDR did not take part in the conference, it deposited an

⁹⁰Peter Burger, “The Berne Convention: Its History and Its Key Role in the Future,” *Journal of Law and Technology* 3, no. 1 (1988): 18; Adolf Dietz, *Urheberrecht und Entwicklungsländer. Urheberrechtliche Probleme bei der Errichtung einer neuen internationalen Wirtschaftsordnung* (Munich: C. H. Beck, 1981).

⁹¹Rainer Weppe, “Die Stockholmer Konferenz,” *Der Neuerer* 16 (1967): 294f.

⁹²Decree of 3 August 1963 in preparation of the next diplomatic conference of the Berne Union. See PA AA, B 84 Nr. 341, country report France, 22.

⁹³Gray, *Germany's Cold War*, 22.

⁹⁴CMEA was an economic organisation founded in 1949 and comprising mostly of countries from the Eastern Bloc.

instrument of accession to Articles 22 to 33 of the Stockholm Act in 1968.⁹⁵ Several objections were made to this, and, to that effect, the director of BIRPI stated: "This notifying does not mean that the Director of BIRPI has adopted any position on the question of whether the GDR is or is not a party to the [Berne] Convention. The Governments of the member countries ... are in disagreement on this question."⁹⁶

For this reason BIRPI proposed two dates⁹⁷ for the articles to enter into force in case the validity of the instrument of accession deposited by the GDR was accepted. Shortly after this incident the GDR was recognized worldwide. In 1978, when it acceded to the Paris Act, there were no objections.⁹⁸

Conclusion

History will always question the structure of a development process, be it continuous or full of dramatic twists and turns. At the end of this brief look at the history of copyright in the GDR we can conclude that in the field of copyright the social protagonists of the GDR deliberately left the political space of the Soviet-dominated Eastern Bloc and crossed the Cold War border. However, the GDR could not entirely break away from the difficulties caused by the Cold War, Adenauer's policy and the lack of recognition by the majority of the Western states. Nevertheless, for the GDR the Western-dominated international copyright regime remained the ultimate reference. Thus, the continuous geographical expansion of the individual rights of intellectual property and the acceptance of the international copyright regime were not interrupted or undermined by the GDR. However, they were questioned by the Berne Union authorities and most of the union members.

⁹⁵ See *Copyright*, the monthly review of the United International Bureaux for the Protection of Intellectual Property 4 (1968) 7, 155.

⁹⁶ Ibid., Ricketson and Ginsburg, *International Copyright and Neighbouring Rights*, 1134.

⁹⁷ 26 February 1970 or 29 January 1970, *ibid.*

⁹⁸ Heinz Püschel, "The International Law of the Berne Convention and the National Copyright Law of the Member States, with Particular Reference to the Legislation of the German Democratic Republic," *Copyright* 22 (1986): 144–50.

The GDR was committed to the rules of international copyright and followed them in its legislation and in the international exchange of cultural products from 1955 onward. The legislative commission responsible for the preparation of a draft copyright act gave close consideration to the Rome Act and the discussions held during the preparation of the Stockholm Conference of the Berne Convention, and they found their expression in the new Copyright Act of 1965.⁹⁹

While the Berne Office made a special effort to normalize relations with the newly founded GDR, the Federal Republic prevented them because of its own foreign policy considerations. Within the history of the Berne Convention the case of the GDR was a special one and, as this chapter has shown, might have been more readily resolved if the issue had not been complicated by the political conditions of the Cold War.

⁹⁹ Anselm Glücksmann, "Das Urheberrechtsgesetz und die Internationalen urheberrechtlichen Abkommen," *Neue Justiz* 19 (1965): 686.

From State Governance to Self-Management: Culture and Intellectual Property Rights in Communist Yugoslavia

AUGUSTA DIMOU

Introduction

The following chapter explores the development of copyright in communist Yugoslavia from the late 1940s to the 1970s. Its aim is to situate the evolution of Intellectual Property Rights within the context of the social, economic, cultural and political developments of postwar Yugoslavia and elucidate the rationale behind the implementation of specific options and policies in copyright regulation. It is the contention of this chapter that the institutionalization of specific copyright regimes in communist Yugoslavia was intricately linked to much more than the customary catalysts of change in IP governance, such as modifications in international copyright doctrine and the introduction of new technologies. Rather, local developments are shown to have been contingent upon several equally, if not more important factors such as the nature of the political and economic system as well as the social structure of the country, the “political economy” of culture, the particular role ascribed to culture in society, the positionality and the “capital” of stakeholders in the field of culture, the specific challenges posed by the country’s ethnic composition and the quest for equilibrium in the national question, as well as the broader geopolitical orientation of Yugoslavia in the Cold War. Although there were many factors that differentiated communist Yugoslavia from other Eastern Bloc countries, authors and artists enjoyed a socially prestigious and materially secure existence throughout the region primarily due to the heightened significance attributed to culture in socialist regimes

generally. In the case of Yugoslavia more specifically, the creative unions¹ participated directly in the organization of culture and in decision-making processes and were able to control, almost independently, the relations of production and a good part of the labor relations within the cultural industry. Copyright in this context played only a subordinate role among many determinants, supplementing rather than genuinely structuring an already existing “economy of culture” and “field of cultural production.”

The chapter advances a further three arguments: first, copyright regulation in multiethnic states and small ethnic groups faces additional and different dilemmas of governance in comparison with large and established linguistic groups and homogeneous nation-states. The examples of Yugoslavia and the Soviet Union are good cases in point. Second, from the late 1950s onward artists and artists’ unions in Yugoslavia became progressively more empowered and participated actively in controlling the fate and reproduction of their works and the copyright revenues deriving from them. Although at first glance, this development appeared to be the result of the introduction of author-friendly IP legislation in the mid-1950s, it was mainly due to fundamental changes in the overarching system of state organization and of the economy (shifting to the system of *self-government*), whereby the role of interest groups (unions and associations) was upgraded and they became increasingly involved in the legislative and decision-making processes. This “propertization”² of the author, though it went hand in hand with broader processes of liberalization and decentralization of the economy and politics, did not rest on an interpretation of legal doctrine that officially claimed strong property rights for the author, on the contrary; the regime’s broader philosophy on property, production, and creativity (as will be shown below) was moving rather in the opposite direction, that is, it almost negated the existence of the proprietor as a legal entity. The pivotal factor was the mode of societal organization; it was the “political economy” of cultural production and the way it positioned the author strategically within the

¹ By “creative unions” I refer to the official Soviet terminology for authors’ and artists’ unions.

² On the concept of “propertization,” see Hannes Siegrist, “Die Propertisierung von Gesellschaft und Kultur. Konstruktion und Institutionalisierung des Eigentums in der Moderne,” *Comparativ* 16, no. 5/6 (2006): 9–52 (special issue: *Entgrenzung des Eigentums in modernen Gesellschaften und Rechtskulturen*, ed. H. Siegrist); see also the contribution by the same author in this volume.

economy of culture and vis-à-vis other actors of the cultural field and the cultural market by providing support, stimulation, reward, protection, and/or autonomy that made the difference. In other words, *the cultural elites gained a certain degree of autonomy, less due to the legal framework within which they operated but first and foremost through a political act, that is, the powers devolved to them through the communist authorities.* This again was dependent not solely on the existing copyright legislation but primarily on the structure and organization of the entire political, socio-economic, cultural and ideological system: in other words, on the political economy of culture. It was a combination of these factors that allowed cultural elites to push for a greater “proPERTIZATION” of the artist from the 1970s onward, in spite of the regime’s general philosophy. Third, it is argued that Yugoslav copyright in some way mirrors the geopolitical positionality of Yugoslavia in the Cold War, between East and West but also its position vis-à-vis the rest of the world. As illustrated by the following contribution, the “expansion” of copyright is traced in the interaction and interdependence between national and international parameters in the production and regulation of culture. More specifically, the chapter takes a closer look at the conditions and forms that helped shape the appropriation, development, reinterpretation and variation of that institution in the case of Yugoslavia. The Yugoslav case can therefore be regarded on the one hand as exemplary for broader trends in the elaboration of socialist copyright law, and on the other, as an idiosyncratic case study within that same legal framework, confirming thus variation in the trajectory of development of socialist copyright doctrine and practice.

Due to the overtly political nature of communist regimes, the study of copyright in such societies somehow recasts the question of the nature and role of this institution in the regulation of culture, since it lays open questions of power and governance, which in the case of democratic regimes are often concealed behind or silenced through the extreme specialization and juridification of the subject matter. Idiosyncrasies of the communist systems such as the absence of a proper market for cultural goods, the ideologization of culture, the print monopoly of the state, the practice of direct or indirect censorship, etc., all represent a different kind of laboratory in which to test the efficiency and significance of the institution. Communist intellectual property doctrine regarded the evolution

of copyright not as the progressive and amplifying materialization of a universal institution but as part of a historical process, heavily influenced by the social, economic, political and cultural parameters, as well as the local and international contexts that ultimately gave birth to and shaped it. Socialist copyright legitimated itself on the basis of a different narrative of development, closely related to the development of capitalism and the ascendance of bourgeois society rather than on the basis of the “civilizational mission” to protect authors’ rights.³ The official justification for socialist copyright was to create useful works for society. The communist narrative on the legal development of IP perpetuated a history that was contingent and situational and to a large extent implicated in power relations, though communist regimes were not necessarily champions of self-reflexive inquiry when it had a bearing on their own power monopoly. Nevertheless, communist copyright doctrine is perhaps the most illustrative example of the socially bounded nature of authors’ rights. Based upon a tradition of historical analysis insisting on the complex interplay between the legal, economic, political, and cultural dimensions of legal institutions in ways that dissolve disciplinary boundaries,⁴ this chapter argues for the “embeddedness”⁵ of copyright within Yugoslav communist society and economy at large.

Developments in communist Yugoslavia provide an interesting contrast to copyright developments in the same country in the interwar period.⁶ Whereas copyright legislation in the interwar period programmatically professed the intention to turn the author into a proprietor of his labor, the socioeconomic conditions prevalent in the production of culture at the time inhibited the author’s emancipation from various cultural intermediaries such as publishers and the local and international collecting societies.

³ Miklós Világhy, “Les Fondements théoriques de la protection juridique des oeuvres de l’esprit dans les régimes socialistes,” *Annales Universitatis Scientiarum Budapestinensis de Rolando Eötvös Nominatae: Sectio Iuridica*, vol. 6 (Budapest, 1965), particularly 125–36.

⁴ Warrington Sugarman, *Land Law, Citizenship, and the Invention of “Englishness”* (London: Routledge, 1995), 112.

⁵ Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Times*, 2nd ed. (Boston: Beacon Press, 2001), xxiii–xxvii.

⁶ See Augusta Dimou, “Das Recht am geistigen Eigentum in Jugoslawien der Zwischenkriegszeit. Internationaler Institutionentransfer zwischen rechtlicher Normierung und sozialer Praxis,” *Zeitschrift für Ostmitteleuropa-Forschung* 61, no. 3 (2012): 356–77 (special issue: *Institutionenwandel und Rechtstransfer im östlichen Europa des 20 Jhs.*, ed. H. Siegrist and S. Troebst).

The sphere of culture in interwar Yugoslavia was barely regulated through market conditions.⁷ In other words, social reality clearly defied the intentions of the legislator. The opposite was the case in communist Yugoslavia, which was probably representative of a far more dynamic “market” for publishing than its interwar predecessor had ever been and whereas copyright legislation recognized property rights, it did not, however, base its protection of the author solemnly on his/her property rights, but rather on the author’s right to remuneration and autonomy. A further aspect that bolstered the role of the author within the logic of socialist copyright legislation was the position of the creative artist not only vis-à-vis the market but, more importantly, in relation to society.⁸ In fact, though Yugoslav copyright legislation tendentially showed an ever greater propensity to strengthen and augment the author’s pecuniary rights, a trend that culminated in the last copyright law of 1978, this had apparently little real effect as the economy was soon embroiled in crisis in the 1980s.

The Socialist Federative Republic of Yugoslavia

Two major political experiences influenced the development of post-World War II Yugoslavia. The first was the political failure and disintegration of the first Yugoslav state (1918–44), the Kingdom of Serbs, Croats and Slovenes, as it was initially called until 1929, when it was renamed the Kingdom of Yugoslavia. The second was the dispute and subsequent break with Stalin and the alliance of communist parties, the Cominform, in 1948. Those two experiences—particularly the break with Stalin, which had been completely unpredicted—laid the foundations for the long-term

⁷ See Augusta Dimou, “Blurred Boundaries Resulting from a Weak Market: The Professionalization of Publishing in Interwar Yugoslavia in a Comparative European Perspective,” in *Professionen, Eigentum und Staat. Europäische Entwicklungen im Vergleich, 19. und 20. Jahrhundert* (Moderne Europäische Geschichte, vol. 8), ed. Dietmar Müller and Hannes Siegrist (Göttingen: Wallstein, 2014), 272–97.

⁸ This essay forms part I of a chapter dedicated to the development of copyright in communist Yugoslavia. Its main purpose is to establish the general analytical framework. It focuses therefore more on the narration of the chronological and historical context in which to place the activity of the protagonists than on their actual activity, which, while reconstructed on the basis of original sources, does not feature prominently in this exposition.

policy orientation of the Yugoslav communists in the postwar period and had a decisive impact on their approach to state building and on their notion and organization of culture, which in turn both directly and indirectly influenced the development of copyright.

The first Yugoslav state was constructed after the First World War on the basis of a unitary nation-state model. The identity project of “integral Yugoslavism” proclaimed the existence of one single nation, made up of three tribes, two languages, and three religions. This model was unsuccessful for several reasons and even the establishment of the royal dictatorship in 1929 and its targeted efforts to implement the Yugoslav national idea from above, or at least to control the conflicting centrifugal dynamics of interethnic relations, failed to reinforce integral Yugoslavism as the state ideology. Several lessons were learned from this failure with respect to the form of political organization, the regulation of interethnic relations and the role and organization of culture. Due to their negative interwar experiences, the communists abandoned the idea of an amalgamation of all ethnicities into a supranational nation. The attitude of the Yugoslav communists toward the national question was neither linear nor unitary but it can be broadly argued that the second Yugoslav state was founded upon the recognition of existing differences. The new state was constructed on a federative basis and the communists even officially recognized ethnic groups and nationalities that had not enjoyed such status in the first Yugoslav state, such as the Macedonians, Albanians and Bosnian Muslims. All groups enjoyed equal rights and every group enjoyed the right to self-determination; the new federalism therefore allowed the potential institutionalization of multiple identities and loyalties. Admittedly, the interpretations of this concept varied widely and lead to fluctuations in the path toward greater or lesser centralization and/or decentralization, a circumstance that recast political and socioeconomic problems with ethnic divisions. Moreover, according to socialist doctrine, there was little need to repress national identities, which were only a transient stage on the road to socialism. With time they would inevitably wither away, just as the state was expected to wither away as well. Ideology was therefore the fulcrum and impetus of identity construction in the second Yugoslavia.

The second formative experience in the postwar period was the break of the Yugoslav communists with Stalin and Cominform in spring/summer

of 1948. Tito's Balkan ambitions and his tenacity in following an independent regional policy, as well as his reluctance to accept Moscow as the supreme communist authority, were the motives behind the Soviet-Yugoslav confrontation. With the expulsion of Yugoslavia from the international association of socialist states in 1948, the country became politically isolated. Initially, in an unsuccessful attempt to appease Moscow, the Yugoslav communists reinforced ideological orthodoxy but soon modified their course, opting for a comprehensive reorientation in all spheres of life, ranging from the contents of socialist doctrine and the social and economic model of the state to the country's cultural orientation and its broader geopolitical alignment. The break with the wider communist world led to a search for alternatives and the Yugoslav system understood itself explicitly to be a counter project to the Soviet Union. Yugoslavia drew its legitimacy and internal cohesion from the claim to be more democratic than the USSR, and moreover from its ability to withstand the latter's political pressure. In their search for alternatives, the Yugoslavs turned once more to the classics of Marxism and to their own indigenous revolutionary tradition: a popular revolution and liberation war during WW II. Without doubt, Yugoslavia's reorientation was an attempt to turn calamity into virtue. The Yugoslav blueprint was therefore a fundamental critic of Soviet etatism and demanded that the means of production be controlled directly by the people, a concept that was to become the cornerstone of the Yugoslav brand of socialism, the system of *self-management*. Self-management socialism thus developed gradually from the 1950s and reached its pinnacle in the late 1970s when it was legally codified and anchored in the Yugoslav constitution. The program of self-management championed debureaucratization through the establishment of elective workers' councils, decentralization of the administration, politics, fiscal policy and culture, as well as the democratization of all spheres of life. Aimed at involving as great a percentage of the population in economic and social processes as possible, the intention of the new policy was to further legitimize the regime. As a result thereof, the state claimed for itself the role of coordinator rather than that of the leading planner.⁹

⁹ Marie-Janine Calic, *Geschichte Jugoslawiens im 20. Jahrhundert* (Bundeszentrale für politische Bildung, vol. 1093) (München: Beck 2010), 192. For an overarching qualification of Yugoslav socialism with reference to existing hermeneutical models on the nature of communist rule,

Renegotiating Key Notions of Socialism

The above-mentioned developments and the broader ideological reorientation of the Yugoslavs away from Stalinism significantly affected two key concepts of socialist polity. The first was related to a particular understanding of the concept of “pluralism” and the representation of interests in socialist society; the second touched upon the very heart of socialist doctrine and was related to the notion of property.

The development of “pluralist socialism” was the historical and theoretical negation of Stalinism.¹⁰ In the case of Yugoslavia, this negation took place earlier (in 1948) than the general de-Stalinization wave that swept through the rest of communist Europe between 1953 and 1963/64. The initial point of reflection in the Yugoslav discussion on pluralism was the relationship between individual and societal interests in socialism. In the initial etatist phase, before the Tito–Stalin break, Yugoslav communists fully espoused Soviet orthodoxy with regards to the abolition of the contradictions between capital and labor and the automatic creation of a harmonious and peaceful society within socialism. The interests of party, state and society were deemed identical. A series of state internal and external events such as the Cominform conflict, the failure of land collectivization (collectivization was revoked in 1952) and the first industrial strikes (in Trbovlje in 1958) initiated a rethinking process regarding the representation of interests. Self-management provided in fact an apposite platform in order to renegotiate the issue of interests; in contrast to Soviet socialism, where it was enforced through repressive state action, the harmonization of individual and societal interests in self-management socialism ultimately materialized through the producers’ self-managing interests. In addition, the Yugoslav communists were forced to accept that antagonistic interests were not only a “privilege” of capitalism but that they had their share in socialist society as well. At the same time, Yugoslav pluralism sought to also distance itself from Western theories of pluralism.

see: Wolfgang Höpken, “‘Durchherrschte Freiheit’: Wie ‘autoritär’ (oder wie ‘liberal’) war Titos Jugoslawien?,” in *Jugoslawien in den 1960er Jahren. Auf dem Weg zu einem (a)normalen Staat?*, ed. Hannes Grandits and Holm Sundhaussen (Wiesbaden: Harrassowitz, 2013), 39–65.

¹⁰ Wolfgang Höpken, *Sozialismus und Pluralismus in Jugoslawien* (Untersuchungen zur Gegenwartskunde Südosteuropas, vol. 22) (München: Oldenbourg, 1984), 42.

For this reason, it claimed distinction as much from the Western type of party pluralism as from the one-party system type. Instead of the pluralism of parties, Yugoslav doctrine promulgated the pluralism of political subjects.¹¹ Yugoslav society was based on a “pluralism of interests,” which was best represented in a self-management democracy. The “pluralism of the political subjects” was brought to bear in the existing societal organizations, unions, and associations. They fulfilled their role as pluralistic factors in society and provided the institutional framework for the articulation of partial interests. Political subjects, however, were not supposed to compete against, but rather cooperate with one another. In contrast to the methods practiced by pressure groups in bourgeois democracies, political subjects within socialism had no need to exercise pressure upon the state. Rather, they could express their interests through the existing participatory channels of the self-managing organizations in enterprises and society in general, which was an integral part of self-management.¹² Though a certain instrumentalization of the mass organizations cannot be denied, it was the above conception of participation and pluralism that led to an ideational upgrading of the role of the unions and their active participation in the field of culture.

The second notion particular to the Yugoslav interpretation of Marxism, was the concept of “social property” (*društvena svojina*). The concept’s most distinguishing feature was the fact that social property had no owner, it pertained to no one. As a concept, it eluded classification along traditional categories of ownership such as private, collective or state property; nobody, neither an individual, nor the state nor an institution held the right of ownership. Rights to manage social property originated from labor and the social character of productive relations. The collective hence had the right to take decisions but possessed no ownership rights over the property. Society was consequently the “owner” of social property but not its legal proprietor. “Social property” was not a legal concept proper¹³;

¹¹ Ibid., 59.

¹² Ibid., 63; on the representation of interest groups in communist Yugoslavia, see also: Jovan Djordjevic, “Interest Groups and the Political System of Yugoslavia,” in *Interest Groups in Four Continents*, ed. Henry W. Ehrmann (Pittsburg: University of Pittsburg Press), 197–228.

¹³ Views differ among Yugoslav academics as how to interpret “social property” and whether it represented a social convention or a legal category. See UN-Habitat, *Housing and Property*

the fundamental right emanating from social property was the “right of use”; it represented therefore a new civil law right, which was the legal expression of social property.¹⁴

According to the Yugoslav theoreticians, social property satisfied the personal interests of the working people while simultaneously expressing the general interests of socialist society. In self-management, workers could organize the labor process themselves and appropriate production directly. Social property excluded all possibilities of abuse and was therefore the foundation for a true liberation of labor. In view of the fact that production was always an appropriation of nature by man within the context of a specific societal order, it was held that copyright was really dependent on the prevailing form of property in society.

Similar to the concept of “pluralism,” social property was defined *ex negativo*; it was conceptualized as being profoundly different both from private property as well as from socialist state property. State property (a phase, which Yugoslav society apparently went through between 1945 and 1948) was deemed a lower, yet unavoidable, stage of socialist organization before society and the economy advanced to higher forms of organization. It was thus the contention of socialist theory that bourgeois society and its concept of private property only commoditized works of literature. The exclusive right of the author to determine the fate of his work had only a formal character, since in essence the author was transformed into the publishers’ wage laborer. Yugoslav legal scholars like Vojislav Spaić negated the identification of copyright with private property and questioned its intellectual origins in the work of John Locke and

Rights in Bosnia and Herzegovina, Croatia and Serbia and Montenegro (Nairobi: UN-Habitat, 2005), 17. There footnote no. 4 explains that most views regarding the nature of social property “were based on the premise that social ownership was a new socioeconomic category and tenure system, which would neither be fully explained nor grasped by traditional civil law criteria. Many academics agreed that social ownership is an ideological, philosophical, but also (pseudo-)legal category, which cannot be understood as entailing an unlimited right over real property.” The definition and formal introduction of “social property” in the 1963 constitution is also abstruse; there it states that “nobody has the ownership right over social production means—nobody meaning neither social-political communities, associated labor organizations nor single workers—and nobody can under any legal ownership title claim the product of the ‘social work,’ nor operate, nor dispose of social production forces, nor arbitrarily determine the conditions of distribution,” *ibid.*, 17.

¹⁴ Vojislav Spaić, *Društvena svojina i autorsko pravo, Srpska akademija nauka i umetnosti, simpozium o društvenoj svojini*, 20–22.9.1965, *SDS 7* (Belgrade: Naučno delo, 1965), 10.

his conceptual pooling of work and property. Though Locke's argument had been considered progressive at the time, due mainly to the fact that it sought the emancipation of the author, it became useless thereafter. The Yugoslavs proposed rather a different concept, founded upon Proudhon's *Les Majorats littéraires* (1863), which claimed from the start an essential incompatibility between material and immaterial property. While the material world was predestined for appropriation, the world of ideas was fundamentally dissimilar. Ideas were useful when they expanded and acquired universal validity. Such a condition of nonrivalry a priori disqualified the notion of property. The author had a right to remuneration.

At the same time, in order to explain copyright duration, the Yugoslav lawyers fused the notion of creativity and the rights of the author with an older theme of Narodnik socialism addressing the duties and the role of intellectuals in society. This role model promulgated by such prominent Narodnik theoreticians such as Petr Lavrov and Nikolai Chernyshevsky had enjoyed great prominence at the end of the nineteenth and the beginning of the twentieth century. They both expounded on the responsibilities of engaged intellectuals and emphasized the debt and the duty of intellectuals to return to society that which society had invested in them in terms of education.¹⁵ Whereas, the original nineteenth-century argumentation had aimed at motivating intellectuals to engage in the education of the masses (the going to the people movement), now, the argument was contorted in order to rebuke the claim that the author had a right of private property over his/her work. After all, strictly speaking, the author was not the exclusive creator of his oeuvre. In the process of creation, so the argument goes, the author appropriated and used the cultural and artistic achievements of previous generations. It was therefore only fair that the author return his work to the community in the form of common property and as a way of expressing his gratitude to society for

¹⁵ Nikolai Chernyshevsky, *What Is to Be Done? Tales of New People* (Moscow: Ragusa Publishers, 1983); Peter Lavrov, *Historical Letters* (Berkeley: University of California Press, 1967). On the role and mission of intellectuals as perpetrated through the theories of Russian populism and the subsequent radiation of these theories in the Balkans, see Augusta Dimou, *Entangled Paths towards Modernity: Contextualizing Socialism and Nationalism in the Balkans* (Budapest: CEU Press, 2009), 25–47; see also H. James Billington, *Mikhailovski and Russian Populism* (Oxford: Oxford University Press, 1958); N.G.O. Pereira, *The Thought and Teachings of N. G. Černyševskij* (Mouton: Dalhousie University, 1975).

its initial act of benevolence. The relationship between author and society as interpreted by socialist legal experts was framed similarly to Marcel Mauss's gift exchange concept and reflected an economy of receiving and reciprocating rather than one based on commodified value through an impersonal market. Even more importantly, in its conception of the creator, socialist copyright indirectly absorbed and reiterated the older and popular notion of the Eastern *intelligentsia*.

Moreover, culture progressed only when the interminable flow of experience was guaranteed and the author carried a responsibility to safeguard this knowledge flow for the sake of future generations. The author was therefore a kind of link in a long chain of enlightened thinkers, who passed the "good" from one to another, a picture most vividly portrayed by Chernyshevsky in his novel *What Is to Be Done?* Noteworthy in this conception of culture as accumulation, borrowing and exchange of experience and knowledge between generations is the relativization of the notion of the creative genius as a singular and unique phenomenon. It is important to mention that this standpoint encompassed more than the common understanding that socialism privileged the collectivity over the individual or the socialist provision that there was an alleged objective concordance of interests between the individual and society in communist social order. Marxism perceived of history as the succession of stages of development and this conception of history played analogously into the conception of cultural evolution.¹⁶ Correspondingly, in socialist copyright law the notion of "creativity," which was regarded as a general human capacity, was not a primordial criterion for ascertaining whether a work was "novel" and therefore worthy of copyright protection. Socialist legislators were altogether more "nonchalant" regarding the use of existing works as templates or as sources of inspiration for the creation of new ones. The efforts of legislators went rather into determining the appropriate distance and/or distinctive features between works than assuming a priori an outright "either-or" relationship between them. Originality was embedded in social relations and in the service of mankind; it represented a central criterion but it was not the cornerstone of copyright ontology.

¹⁶ Though the notion of the genius was relativized, disputes over the role of the author and his approach to aesthetics and reality still prevailed, especially in connection to literary currents such as socialist realism.

And finally, that which would appear as the greatest paradox of all: though socialist copyright did not frame the individual author as a solitary genius in philosophical terms, author's rights in socialist legislation were conceived as thoroughly subjective rights; they were tied to the person of the author in a far more absolute, unalienable and principled manner than was ever framed in Anglo-Saxon copyright law.

Socialist doctrine moreover stressed the fact that the author fulfilled a cultural and social function and had therefore to be guided by general social interests.¹⁷ In turn, the socialist state had the duty to guarantee the author the most propitious conditions for creative labor by endowing him with the greatest possible protection for his intellectual creation and the greatest possible dissemination of his works in society. By protecting the individual interests of the author, the law had to bring those in harmony with the interests of society, for only then could the author's function acquire a social character.¹⁸ The notion of social property permitted the balancing act and the merging of individual and social interests, as social property was considered the basis of copyright. Copyright in conditions where social property prevailed differed from those in conditions of state property (of the Soviet type), where the interests of the socialist state were given priority and the author was deprived of comprehensive protection. It was because social property precluded the possibility of exploitation that it guaranteed—in an ideational manner—the producers' direct control over the means of production and—in practice—the right to administer the flow of copyright revenues.

In addition, societal interest was inscribed in the law through the adaptation of the monistic interpretation of copyright law and single copyrights. The law of 1957 (in the new spirit of self-management) treated copyright as unitary law, which simultaneously contained components of both property and personality rights; it was therefore impossible to separate ideational from material interests. The Yugoslav jurists argued that the monistic interpretation negated the commodity character of a literary work and best proved the inalienable intellectual relationship between the

¹⁷ Vojislav Spaić, "Savremena zaštita autorskog prava u svijetu i kod nas," in *Autorsko pravo i izdavači* (Belgrade: GRO Prosveta, 1984), 25.

¹⁸ *Ibid.*, 35.

author and his/her intellectual creation. Consequently, it was impossible to prioritize either the material or the personal aspects one over the other; they were intertwined, and precisely in that entanglement rested the societal interest of copyright.¹⁹ The primary function of copyright—according to the Yugoslav jurists—was to boost intellectual wealth and raise the cultural standards of the masses.

Precarious Balancing between Market and Ideology

The introduction of self-management brought changes to the entire state structure; from the political system to the administration and particularly in the economic sphere. Pointedly labeled a “market-planned economy,”²⁰ the Yugoslav economic system combined elements of Marxist socialism with aspects of free enterprise. From the 1950s onward, the Yugoslav communists progressively introduced a series of reforms aimed at the liberalization and decentralization of the economy and a greater reliance on market mechanisms, a process that was pursued more rigorously and in a more concerted manner toward the end of the 1960s. Though the Yugoslav system was not without its flaws, it managed to successfully combine such opposing elements as worker’s self-management with the extensive use of market mechanisms and the monopoly power of the League of Communists.

Immediately after WW II, the communist leadership proceeded to adapt Yugoslav society as quickly as possible to the Soviet model. The central objective of economic policy was the firm establishment of state ownership and control over the means of production. Until the break with Cominform, Yugoslav communists pursued a system of nationalization, rigorous economic planning and management. With the subsequent introduction of self-management many political and economic decisions were decentralized from the federal government to the six individual republics, two autonomous provinces, and multiple communes and enterprises in

¹⁹ Spaić, *Društvena svojina i autorsko pravo*, 12.

²⁰ Svetozar Pejovich, *The Market-Planned Economy of Yugoslavia* (Minneapolis: University of Minnesota Press, 1966).

order to accommodate the diverse needs and aspirations of the country's various nationalities.²¹ The concept of self-management became the cornerstone of the country's socioeconomic and political system and was later extended to other institutions such as universities, hospitals, libraries, and other public and social areas. The Yugoslav communists questioned whether the central directing role of the state was paramount, and reinterpreted Marxist classics in such a way that the withering away of the state was not only possible but was to be encouraged in the course of constructing socialist modernity.²²

The 1950s saw the creation of the communal system, which established the commune as the country's primary political unit and gave them the power to legislate on all matters other than those reserved for the federal and republican government levels. The reforms of the 1960s went a step further and were aimed at bringing together an economic mechanism combining administrative and market instruments and a fully-fledged, labor-managed economy.²³ The constitution of 1963 strengthened self-management and the reforms introduced between 1966 and 1970 pursued long-term goals, such as an increase in economic efficiency by relying more on market mechanisms, a reform of the price system, a revision of growth and investment policies, the liberalization of foreign trade and the improvement of the international competitiveness of the country. Since the early 1970s, the relationship between the economic organizations of productive (factories, etc.) and nonproductive (culture, education, etc.) spheres came to be governed by the principle of free exchange of work according to which, production units allocated part of their income to the respective units of nonproductive sectors (like culture) in return for the latter's services. The last constitution of socialist Yugoslavia in 1974 gave federal republics almost unlimited economic and political sovereignty.

As in the case of economic development, in the domain of culture the state also abandoned a unitary approach but was faced with a demanding double task; while it saw the need to liberalize, it had at the same time to ensure that discrepancies and divisions in economic, social and

²¹ György Simon, *An Economic History of Socialist Yugoslavia*, 27 June 2012, <http://ssrn.com/abstract=2094334> or <http://dx.doi.org/10.2139/ssrn.2094334>, 7 [in Russian].

²² *Ibid.*, 9.

²³ *Ibid.*, 12.

cultural development between the different republics and regions were progressively bridged. Decentralization in Yugoslavia was conditioned by its multinational population structure, which was the touchstone for the survival of the Yugoslav experiment. As a consequence, the identity model adopted aimed at equality in representation and was implemented through administrative measures such as the implementation of a rota system, representation quotas, etc. The communists institutionalized a demanding model of cultural pluralism. Cultural and national diversity was mirrored in the federal constitution but also in the various constitutions of the republics and provinces, which guaranteed every nation and nationality²⁴ the right to free development and the protection of their particular national and cultural identities.

As a result a thorough decentralization of culture took place parallel to the development of self-management. Every nation and nationality could set its own priorities and settle its own cultural issues within its political and administrative unit (republic, province or community). There existed no federal ministry of culture with the competence to override local decisions. The only authorities at federal level were those with a coordinating function.²⁵ Decentralization touched all aspects of cultural organization; for example, every republic had its own writers' union, which sent representatives to the countrywide/federal congresses of the national writers' association of Yugoslavia. The individual federal associations were largely autonomous in their policies. At the same time the creative unions were organized at the federal level according to artistic fields (the union of composers, writers, painters, performers, interpreters, etc.). The licensing agencies were also organized at the level of the republics and functioned as local, autonomous branches of the federal licensing agency. Their revenues were also administered locally. Every republic had its own, autonomous, academy of sciences, ministry of culture and education, etc. In other words all federal-level institutions were mirrored at the political and administrative level.

²⁴ The Socialist Federal Republic of Yugoslavia consisted of "nations" (*narodi*) and "nationalities" (*narodnosti*). Officially, there were six nations (Serbs, Croats, Slovenes, Macedonians, Montenegrins, and Muslims) and eighteen nationalities (Bulgarians, Albanians, Slovaks, etc.).

²⁵ Stevan Majstorović, *Cultural Policy in Yugoslavia: Self-Management and Culture* (Paris: UNESCO, 1980), 32–33.

Neither the state nor the central authorities financed cultural activities. Rather, culture was sponsored through a complex, mixed parity financing system, consisting of a contingent from the income of the labor organizations (enterprises, factories, etc.), set aside for cultural activities, the revenue earned by the cultural institutions themselves (theaters, opera, etc.) as well as subsidies from the communities. The financing system was based on pooling labor and the working funds of the labor and cultural organizations. The funding of cultural institutions and policy changed after 1951. Cultural institutions were expected to function as enterprises and all state financing was suspended (or was kept to a minimum). All personnel appointments in cultural institutions were financed by the institutions themselves and the salary system was replaced through an allotment system based on effectiveness and quality.

The Yugoslav system became partially caught up in the contradictions of its own different and intricate roles; on the one hand was the desire to integrate market mechanisms in the economy and on the other, the promise to guarantee a comprehensive and uniform development for the whole country. National income, however, was allocated according to market mechanisms and they tended to favor the stronger and wealthier nationalities and republics in comparison to the weaker ones. Economic inequality constantly undermined and jeopardized the political project of Yugoslav communism (equality for all), which in turn represented a danger for Yugoslavia's continued existence as a multinational state. This circumstance created a tension between the objectives of culture (safeguarding individual identity and distinctness) and the market, since the appropriate representation of all cultural groups was not necessarily cost effective (rather the contrary) but was politically indispensable.

The expenditure for publishing and translations provides a good example. It is important to note at this point that Yugoslavia had a provision ensuring the equality of all languages in the federation.²⁶ For multiethnic regions such as the Vojvodina, where the administration was bilingual or even trilingual and radio and television were broadcast in five languages, the issue of translations was crucial for maintaining equilibrium

²⁶ On the language policy and politics of the Yugoslav state, see: Ksenija Cvetković-Sander, *Sprachpolitik und nationale Identität im sozialistischen Jugoslawien (1945–1991)*, Serbokroatisch, Albanisch, Makedonisch und Slowenisch (Wiesbaden: Harrassowitz, 2011).

in cultural politics. In practice, it meant that all important literary and scholarly works had to be translated into at least one local language, which generally proved unprofitable since such insignificant numbers were involved in each edition in a regional or minority language. So, for example, the production of a book in Slovak (there were approx. 84,000 Slovaks in the Vojvodina) was twenty times more expensive than the production of a book in Serbo-Croat (spoken by around 15 million people). The same applied for the production of books in Bulgarian, Romanian, or Ruthenian. Editions in those languages were exceedingly small (approx. 500 copies). Even editions in Macedonian or Slovene (1.2 and 1.6 million respectively) were not necessarily profitable. The cost of book production in those languages was three to five times higher than that for equivalent publications in Serbo-Croat.²⁷ The same asymmetries prevailed in the production of newspapers and journals in the various different languages.²⁸ These were some of the reasons that dictated the rationale that culture should not be left solemnly to the workings of the market and resulted in the institutionalization of a common fund to finance the cultural development of smaller nationalities.

In addition, in the field of culture the disparities between the goals of a socialist society and the aims of the market lead to clashes during the implementation of the self-management system. The self-managing organizations contributed to a rapprochement between cultural institutions and society, which in turn, transformed organizations and enabled the implementation of new, more developed and more successful working methods; yet this development resulted in institutions being motivated more by commercial than by cultural motives, which consequently jeopardized the political project of the communists.

Finally, the break with the Soviet Union brought far-reaching changes in the realm of cultural policy: abandonment of socialist realism, freedom of creation, changes in the curricula and teaching contents, availability of literature in a variety of foreign languages, pluralism in literary and art movements, cooperation and communication with the world and an openness to the West. The Communist Party had to acknowledge that it

²⁷ *Ibid.*, 59.

²⁸ *Ibid.*, 78.

was not an uncontested authority in ideological and intellectual questions. It even changed its name from the Communist Party to the League of Communists of Yugoslavia, pointing at the democratization within its ranks but also at the political separation between the party and the state. It was a tightrope walk nevertheless; the party abandoned the cultural sector largely to the creative artists themselves but did not give up entirely the claim to be the ultimate authority in artistic and cultural life. On the one hand, it claimed the right to set the norms for artistic creation and on the other, it provided space that allowed artists themselves to participate in the standardization of the same norms. Liberalism in culture was accepted and restricted at the same time. Avant-garde movements and all Western schools of thought were tolerated, unless they touched a nerve within the regime, that is, they questioned the superiority of the Yugoslav system and its leaders.²⁹ The Yugoslav Communist Party, in common with other communist parties, initiated modernization processes, which at the same time it felt compelled to control.

The Communist Legislations: Empowerment through Devolution of Competences

The subsequent copyright legislations passed in Yugoslavia at roughly ten-year intervals (1946, 1957, 1968, 1978),³⁰ reflect in many ways the socio-economic, cultural, and political developments in the country but also its broader hybrid geopolitical position in the world between East and West. A series of important internal developments such as the introduction and maturation of self-management and the greater federalization of the country were directly reflected in the change of roles and competences between different institutions, organizations and state levels. The Yugoslav legislation also reflects its search for an intermediate path between East and West, a society looking for paragons in the world to follow but also capable of devising, incorporating and inventing creatively and according

²⁹ Predrag Marković, *Beograd između istoka i zapada 1948–1965* (Belgrade: Novinsko-izdavačka ustanovka Službeni list SRJ, 1996), 524.

³⁰ See Slavica Krneta, “Zur Entwicklung des Urheberrechts in Jugoslawien,” *Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil (GRURInt)* 11 (1981): 663–69.

to its needs. As such the Yugoslav example also demonstrates the fluid borders between Eastern and Western copyright. These were conditioned on the one hand by a search for answers to similar questions such as the appropriate form and content of publishing contracts or the desire to balance diverse and often conflicting pecuniary interests in the regulation of knowledge. Yet on the other hand, East European jurists were driven by distinct social philosophies and societal visions and were embedded in different economic systems, all of which were circumstances that framed their specific handling of copyright as a legal instrument. The Yugoslav legislators were active in a socialist society and a certain balancing act was required in order to remain within the framework of the Berne Union or at least to avoid clashing with some of its provisions. The particular configuration of copyright in Yugoslavia came about through the synergetic effects of internal and external influences and pressures.

There were certain constant parameters in the diachronic development of copyright between the first and second Yugoslavia. The most salient feature concerned the mode and fate of translation rights. As was also the case with other multinational state formations such as the Soviet Union and the Habsburg Empire or nation-states inaugurating their national culture, the right to translation proved to be one of, if not the most, significant testing grounds for the participation in, or opting out of, international organizations. The first Yugoslavia signed the Rome revision (1928) of the Berne Convention in 1931, albeit with reservations concerning the translation of foreign works (a book could be translated into the Yugoslav languages 10 years after its initial publication even without the author's authorization). The reservations were inscribed into Yugoslav copyright law (1929) and this tradition was taken over intact from the communist legislators, in fact, similar provisions were used to regulate inter-Yugoslav relationships and the translation rights between the different Yugoslav languages.

Communist Yugoslav copyright legislation showed a clear tendency toward liberalization over the decades. Language pertaining to property was, by and large, initially absent; however, it picked up from the late 1960s onward (laws of 1968 and 1978). Starting in the 1950s there was a steady weakening of state and federal competencies, while the author (propertization through devolution of competences) and decentralization

(competencies at the level of the republics and regions) were significantly strengthened overall. There was a tendency (mirrored throughout society) to independently regulate labor relations and the distribution of duties and competencies, through self-management agreements (e.g., the conditions and standards for remuneration of radio broadcasts) between the various levels and the various sectors of society (unions, labor organizations, cultural authorities, publishers, etc.). Finally, similarly to other socialist countries, there was also an intention (laws of 1968 and 1978) to recognize the social usefulness of works and thus incorporate evaluation criteria concerning the same in the drafting of authors' agreements.

The new communist state that was created in 1943 stood for a new social and economic order and the copyright law passed on 25 May 1946 reflected precisely this intention.³¹ The regime purposely stressed the discontinuity between the old and the new state and for this reason, in the initial postwar years, Yugoslavia ceased being a member of the Berne Union though there was no official rupture in international relations. The new copyright law was drafted in the midst of the nationalization process and naturally reflected this condition by reserving a prominent role for the state. The overall character of the 1946 law was prescriptive; through simplistic and restrictive measures, it incapacitated the author in several respects. It envisioned strengthening the state as the ultimate proprietor of all artistic works and institutionalized a *domain public payant* in Article 11 whereby at the end of the term of copyright all rights returned to the state. In essence, it eradicated the possibility of the public domain, ensuring that after the death of the author and his heirs all rights were recouped by the state. The use of artistic works already in the *domain public payant* was impossible without state authorization and the payment of fees. The law even failed to stipulate a maximum duration of protection *post mortem auctoris* (p.m.a.). (It was simply not mentioned, apart from provisions regarding the heirs' rights, that is, until the death of the spouse or the youngest offspring's twenty-fifth birthday, whichever was sooner/ later.) In the case of folklore, the state was in fact the prime copyright owner. The law provided for a long list of free uses for the purposes of education, press use, etc. In the cases where the state was the direct copyright

³¹ *Službeni List Federativne Narodne Republike Jugoslavije*, 4.6.1946, no. 45, 518–21.

owner 50 percent of the revenue was used to finance the national arts and sciences and the remainder was allotted to the creative unions in order to support and compensate artists. A Yugoslav citizen could publish an original work for the first time abroad, only under the condition the work had been previously offered to a Yugoslav publisher and the manuscript had been rejected. In any other case, the author lost all rights and could potentially be prosecuted (Article 24). Generally speaking, the author's consent was necessary for the reproduction of his/her works. It was nevertheless possible to override the author and perform already published dramatic, musical and other works without the author's permission. Heirs could not prohibit the publication or performance of a literary, artistic or scientific oeuvre but retained—in the same way as the author—the right to compensation.

The passage from state property to social property in the 1950s instigated a revision of the copyright law. The conception of a society where free-willed workers self-managed their labor relations did not fit well with the image of the disadvantaged author. In the sphere of production, changes had already been legislated through the 1950 law on the management of state enterprises, which transferred the administration of public enterprises to the workers' collectives. Moreover, on 23 June 1951 Yugoslavia ratified the Berne Convention and the country's existing copyright law now came into conflict with its international obligations. Fear of the application of *iure conventionis*³² and the fact that Yugoslavia might be overwhelmed by future developments, propelled the country into action. The copyright law of 10 July 1957³³ reversed several provisions made in the previous law. The *domain public payant* was dropped and the state abrogated its copyrights; the public domain was reinstalled. Popular art could be used freely against a contribution to the Fund for the Development of Artistic Activities. The term of protection was set at fifty years p.m.a. and the new law placed an emphasis on moral rights, which could now be passed on to the heirs and to the appropriate artists' associations. The transfer of copyrights was free. In cases of heirless authors copyrights were

³² The application of *iure conventionis* refers to the possibility that the law stipulated by the Berne convention (because more rigorous and/or comprehensive) might be able to override national legislation.

³³ *Zakon o autorskom pravu* (Belgrade, 1957), 1–25.

transformed into social property and the community in whose territory the author had died became the new right holder. The greatest influence of the self-managing philosophy and practice was reflected in the autonomy and self-administration accorded to the creative unions. The authors' associations became entitled to administer copyrights and royalty payments within their artistic field. They could exercise the same function concerning the rights of Yugoslav citizens living abroad and they were even entitled to create special institutions, which could function as licensing agencies. The author's authorization became mandatory for the reproduction of his/her works in various forms of publications and the amount of works available for free use was reduced from one-third of a total of one-quarter. Authors were no longer penalized for publishing abroad an original work for the first time; in fact, under the new law the author was not even obliged to offer it to a Yugoslav publisher in the first place.

Developments within Yugoslavia and abroad in the 1960s prompted the next legal adjustment. The revision of the Berne Convention through the Stockholm diplomatic conference of 1967 was heavily supported by the Yugoslavs, who were active participants in its demanding negotiations. Furthermore, Yugoslavia ratified the UNESCO-sponsored Universal Copyright Convention (UCC) in 1966, which, due to less stringent admission standards than the Berne Convention, was more attractive for developing and socialist states. Yugoslavia then had to bring its legislation in line with the stipulations of this convention as well. Self-management was broadened to include additional spheres of administrative, social, and cultural life. Finally, the moral and material protection of authors was inscribed in the new 1963 Yugoslav constitution (Article 45). The law of 29 July 1968³⁴ addressed, in particular, copyright for cinematographic works and the relationships between the various creative artists involved in film production; it dedicated a special section to publishing contracts for the first time and expounded in greater detail on works for hire and on commission. The 1968 law reinstalled—upon the insistence of the creative unions—the *domain public payant* but not in the conventional sense as a term of protection but as a special tax for the right to use works whose copyright has expired, the proceeds of which were for the benefit of the

³⁴ *Službeni List Socialističke Federativne Republike Jugoslavije*, 24.7.1968, no. 30, 597–606.

community. Concerning the publishing contract, the Yugoslav legislators found a solution which lay somewhere between the Anglo-Saxon and the East European models. Whereas in the case of the former, the author-publisher relationship was regulated by a free contract based on the general framework provided by contract law, in the case of the latter, the contracting parties used standard form contracts for different types and categories of works. The Yugoslav approach was a compromise between the two. The new law provided the binding framework for all author agreements, while all specific provisions in contracts were regulated by free agreements. Civil law regulations could be additionally applied to this arrangement.³⁵ Membership of the UCC added one more option to the existing translating alternatives; the use of statutory licenses on the basis of Article 5 of the UCC.

Copyright law in socialist Yugoslavia was amended for the last time in 1978.³⁶ The new 1974 constitution had brought the greatest decentralization of competences from the federal level to the individual republics and regions and it proved necessary to adjust copyright law in line with the new realities. The 1978 copyright law can be rightfully regarded as the culmination of de-etatization, decentralization and author-centered propertization in the long modification processes of the Yugoslav copyright regimes ever since the mid-1940s. The new law mentioned for the first time the notion of exclusive right and also introduced *droit de suite* as a distinctive property right authorizing the author to require supplementary payments in cases where profits from an authors' creation far exceeded the original payment received by the author (Article 58). Remuneration rates for public broadcasting were decided through self-management agreements on equal terms between the authors' unions, the organizations of associated labor for radio and television, the association of Yugoslav unions and the Socialist Alliance of the Working People of Yugoslavia. A long list of provisions devolved authority from the federal level to the republics and regions. The federal state merely regulated copyright; all other competences were entrusted to intermediary levels. Licensing agreements for translation rights commensurate with the terms

³⁵ Spaić, "Savremena zaštita autorskog prava u svijetu i kod nas," 38.

³⁶ *Zakon o autorskom pravu* (Zagreb, 1978), 1–51. See also: Miodrag Janjić, "La nouvelle loi Yougoslav sur le droit d'auteur," *Yugoslav Law* 1 (1979), 49–57.

of the UCC were now also accorded to the regions and were further regulated by regional statutes (Articles 45 and 46). Remuneration for the staging and exhibition of literature, modern and folk art was regulated by republican and regional guidelines. The rights of heirs were regulated according to the respective republican and regional inheritance laws. The new law delegated the protection of portraits, photographs, diaries, letters, and other personal belongings to the republican and regional level. The legal regulation of publishing activities was relegated to the republics and regions. Though the federal copyright law functioned as the encompassing framework for copyright protection, specific competencies were still regulated by separate copyright rule books in the various republics. The republics determined how “free works were managed,” whether and how dues were to be paid and for which purposes they would be used. Standards and benchmarks for fees and remuneration were settled through self-management agreements and the authors could act as advisors to the publishing houses’ executive boards or belong to the publishers’ self-management organizations or even participate in self-management meetings on an equal basis. Author’s fees were regulated on a sliding scale through the contract but their total remuneration was agreed freely between the author and the publisher. In practice, authors could communicate freely with foreign publishers and negotiate contracts on their own or through their unions; they did not need to go through the central licensing agency, barring the transfer of foreign currency.

As already mentioned, copyright development in Yugoslavia aimed to find an equilibrium between the Eastern and the Western experience. The features that brought it closer to a socialist conception of copyright³⁷

³⁷ On socialist copyright legislation in general, see Aurel Benard and György Boytha, “Socialist Copyright Law: A Theoretical Approach,” *Revue Internationale du Droit d’Auteur (RIDA)* 89 (1976): 63–93; Michael A. Newcity, *Copyright Law in the Soviet Union* (New York: Praeger Publishers, 1978); Konstantin Katzarov, *Gewerblicher Rechtsschutz und Urheberrecht der UdSSR und der Volksdemokratien Europas* (Weinheim: Verlag Chemie, 1960); *Aktuelle Probleme des sozialistischen Urheberrechts* (Berichte 16/84) (Berlin: Humboldt Universität zu Berlin, Sektion Rechtswissenschaften, 1984); Dietrich A. Loeber, *Urheberrecht der Sowjetunion. Einführung und Quellen* (Frankfurt a.M.: Alfred Metzner, 1966); Yolanda Eminescu, “Aktuelle Probleme des Urheberrechts der europäischen sozialistischen Länder,” *Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil (GRURInt)* 7 (1980): 387–450; Serge L. Levitsky, “Continuity and Change in Soviet Copyright Law: A Legal Analysis,” *Rev. Soc. Law* 6, no. 4 (1980): 425–64; M. Világhy, “Les Fondaments théoriques de la protection juridique des oeuvres de l’esprit dans les régimes socialistes,” *Annales Universitatis Scientiarum Budapestinensis de Rolando*

were the greater flexibility conceded to various forms of free use as well as the retention of statutory licenses, usually, but not always, including remuneration for artists and their heirs. Reproduction rights for radio, television, and the press were often subsumed under forms of free use, a model that was most consequentially developed and followed by the Soviet Union and was prevalent in one form or another in most communist countries of Eastern Europe. A second distinctive feature of socialist copyright was the really short terms of contract (on average four years); when a contract expired, a new one was usually drafted instead of the old one being renewed or extended. Quite distinct for socialist countries and in contrast to Western copyright was the particular attention paid to the regulation of works for hire and of work resulting from an employment relationship. The law tended to seek an accommodation between employer (labor organization) and the creator, particularly taking into account the interests of the creator. In Yugoslavia, the employer (organization) received an exclusive exploitation right of such works for the period of five years only and even within that time span, the creator/employee had a right to adequate remuneration according to the stipulations of the self-management agreement.

Rethinking Autonomy in Communist Regimes: Some General Reflections

An examination of the history of Yugoslav copyright provides a good example of a state's efforts to strike a balance between a liberally inclined and a socially minded copyright regime and moreover demonstrates considerable success. I believe that the reasons behind this phenomenon lay with the fact that the Yugoslav regime provided sufficient *autonomy* for creators not only in intellectual and ideological terms but particularly in terms of their social and economic status and their negotiating power.

In support of this argument, I would cautiously posit the more general claim that the economy of culture in socialism caused the collapse of a basic contradiction inherent in what Pierre Bourdieu has called the

Eötvös Nominatae, Sectio Iuridica, vol. 6 (Budapest, 1965); Adolf Dietz, "Intellectual Property and Desocialization in Eastern Europe," *International Review of Industrial Property and Copyright Law (IIC)* 26, no. 6 (1995): 851–72.

“cultural field,” thus enforcing a new configuration of the “field of power” in the arts.³⁸ By eliminating the notion of economic capital (profit), so central to the capitalist arts market, socialist culture dissolved the fundamental opposition between a positively connoted notion of autonomy (symbolic capital allegedly based on economic disinterest) on the one hand, and a negatively perceived subordination of art to economic capital (profit, the market), on the other. By cancelling this fundamental opposition, socialist culture not only redefined symbolic and economic capital as fully compatible with one another (artists did not have to pretend to be materially disinterested in order to acquire prestige and thereby defend their status and their “exotic” and sometimes unmarketable cultural products because the system rewarded their labor anyway) but also subordinated both types of capital to the preeminence of political power. This subordination entailed simultaneously an upgrading of the social status of creative artists to the privileged rank of the “creative intelligentsia.”³⁹ Authors’ rights provided a general framework that defined the relationship of the creator with his/her work; remuneration, however, resulted from administratively set up labor standards (though socialist jurists clearly distinguished between copyright and labor law, viewing them as two distinct fields of jurisprudence that did not intersect), whereby creative artists were often also provided with stable employment in the major national cultural institutions. The new definition of the power field usually translated for creators/authors into regulated and predictable labor relations instead of erratic and fluctuating market conditions in the field of cultural production. In fact, in communist societies this was largely the bargain that was struck between those holding political power and the creative elites. The manner and conditions of the deal making differed from case to case and the system was certainly not without casualties and contradictions, but the bargain structured the literary field and provided power holders and creative elites alike with reciprocal legitimacy. When communist regimes defied

³⁸ Pierre Bourdieu, *The Field of Cultural Production*, ed. Randal Johnson (Oxford: Polity Press, 1993).

³⁹ For more on this, see: George Konrád and Ivan Szelényi, *The Intellectuals on the Road to Class Power* (Brighton: Harvest Press, 1979), particularly Parts III and IV. A thoughtful and self-ironic account of this process is offered by Miklós Haraszti, *The Velvet Prison: Artists under State Socialism* (New York: Noonday Press, 1989).

the bargain and became excessively repressive, cultural creators readjusted their habitus and contested the structure of the literary field anew. By creating parallel structures of signification, status and circulation, they reclaimed autonomy in the form of symbolic capital by positioning themselves not against their time-honored antagonist, economic capital, but against political power itself.

Yugoslav communists, generally speaking, kept their side of the bargain so that the relationship between power and creative elites in Yugoslavia remained largely symbiotic.

The Role of Culture in Socialism and the Cold War

The cultural framework of the post-World War II era can be attributed as much to the international constellation of the Cold War and the specific (didactic) emphasis awarded the arts by communist regimes, as to additional technological and social developments such as the massification of society. The role of culture in socialism cannot be viewed independently of its overall systemic function. Bestowed with the mission to create the “new man,” and to disseminate and inculcate the values of the new social order, culture in communist regimes acquired a commanding significance. It was this correlation of culture with the broad educational and hegemonic objectives of communism that upgraded its role from a sector of society and state policy to a key instrument in the incorporation of the masses into the new social order. Communist regimes paid exceptional attention to culture and dedicated inordinate time and energy to deliberating the arts and sciences, to a degree almost unthinkable for ordinary parliamentary regimes. As banal as it might sound, the written word and the fixation of expression carried extraordinary weight in real socialism, which may also explain the institutionalization of a vigilance system and surveillance mechanisms based around them.

These far-reaching programmatic tendencies were coupled with profound interventions in the social structure of the predominantly agrarian societies of the East and Southeast Europe and conscious acts of social engineering geared at forming, transforming, and reforming existent social relations with the aim of achieving an advanced industrial model.

Whereas copyright in postwar Western Europe aimed at protecting the creator from mass society and the encroachments upon author's rights prompted through new reproductive media and techniques, developments in the East went in a different direction; due to ideological reasons and pragmatic necessities, communist elites enforced the massification of culture. The relevance of copyright in the regulation of culture and knowledge in communist regimes was determined predominantly by ideological rather than economic prerogatives. What was sanctioned therefore was not access to culture and knowledge (which was desired) nor the mechanics of circulation and distribution (which were predominantly administrative) but ideological transgressions through culture and knowledge (which were considered dangerous). This would also help to explain the indifference of communist regimes toward the extensive internalization of intellectual property as an institution and moral yardstick of appropriate conduct in society. Moreover, societies, which in their historical trajectory had experienced a weak or short-lived bourgeoisification process, generally disposed altogether of a fragile tradition of internationalization mechanisms. It would seem therefore that the social conditions prevalent in several countries of the Southeast and East Central Europe and the hegemonic enlightenment project of communist elites met each other half way. To this end, the communist elites of the postwar period continued, in many ways, with the projects of their predecessors, the elites of the interwar period; modernization, alphabetization and nationalization remained for the communists, precisely as for the interwar political elites, the priority of the state and this purpose was served better through broad and unrestricted mechanisms of access to culture and knowledge than market conditioned mechanisms.

The Cold War shaped "a new way of transferring and selling ideas, values, productions and reproductions."⁴⁰ In the global rivalry between the superpowers, culture moved from being on the sidelines to become the center of political confrontation, whereby propaganda and culture intersected in several ways. In order to win the "hearts and minds of men," policymakers on both sides realized the need to appeal more to their

⁴⁰ Jessica C. E. Gienow-Hecht, "Culture and the Cold War in Europe," in *The Cambridge History of the Cold War, Vol. 1: Origins*, ed. Melvyn P. Leffler and Odd Arne Westad (Cambridge: Cambridge University Press, 2010), 399.

cultural than to their political identity.⁴¹ The Cold War and the bipolar competition for ideological and cultural preponderance resulted in an unprecedented privileging of culture and cultural relations in Europe.⁴² Art and culture in the Cold War became so central because they could be used as indirect fields of activity or signifiers to transmit important messages to the other side (the other bloc, the people, a rival political group within the Communist Party, etc.). Culture in the Cold War was a polyvalent semantic field and the stakeholders could access a rich vein of meanings with political inference without having to spell out the political message directly. In that sense, culture was highly politicized.

Yugoslavia profited like no other country of the Eastern Bloc from this global competition. Through its liminal and idiosyncratic global positioning after the 1950s, it managed to sit on the fence and extract advantages from both sides by playing the superpowers against each other. Its particular brand of liberal cultural politics served a double purpose: as an instrument of legitimization for domestic politics and as a window to the world in foreign affairs. The country's cultural policy and self-image fed each other reciprocally, endeavoring to underscore the fact that Yugoslavia was to be regarded as something particular, neither East nor West; More progressive than the East through its particular brand of socialism "with a pleasant face" and on a par with the West and therefore deserving economic, military, and political support. As a result, cultural openness became a trademark of Yugoslav socialism and could conceal some of the least pleasant aspects of the system, such as one-party rule.⁴³ The necessity of maintaining this image also brought tangible results; it served as a "security blanket" for artists and intellectuals and, in the realm of popular culture, it offered common people a "valve" in the form of virtually unhindered access to Western material culture.⁴⁴

⁴¹ Ibid., 401.

⁴² Ibid., 418.

⁴³ Dean Vuletic, "Sounds Like America: Yugoslavia's Soft Power in Eastern Europe," in *Divided Dreamworlds? The Cultural Cold War in East and West*, ed. Peter Romijn, Giles Scott-Smith, and Joes Segal (Amsterdam: Amsterdam University Press, 2012), 116–17.

⁴⁴ Predrag Marković, "Where Have All the Flowers Gone? Yugoslav Culture in the 1970s between Liberalization/Westernization and Dogmatization," in *The Crisis of Socialist Modernity: The Soviet Union and Yugoslavia in the 1970s*, ed. M.-J. Calic, D. Neutatz, and J. Obertreis (Göttingen: Vanderhoeck und Ruprecht, 2011), 123.

It was the interplay between the national and international context (and here I refer to something other than simply transfers and transplants of international legal doctrine) that go some way to explaining the argument regarding the embedded character of Yugoslav copyright that was presented in the introduction. Against this backdrop it is possible to elucidate the mixed character of Yugoslav copyright and its more “liberal” provisions such as the absolute freedom to publish abroad without previous approval or interference from the state authorities, the more liberal and negotiated character of the publishing contract and the decentralized organization and flow of royalties but also the more liberal character of the economy of culture in Yugoslavia through multilateral funding, the strong negotiating capacity of the creative unions and the self-management organizations, the existence of a greater percentage of freelancers in cultural production, etc. Yugoslavia adopted a copyright regime that best fitted its geopolitical positioning, that is, it was compatible with the country’s international obligations (a situation that the Soviet Union, for example, circumvented until the late 1970s by purposely avoiding being bound to international standards) and the specific socioeconomic and cultural model that the Yugoslav communists were trying to devise domestically. This chapter argues that to a great extent they indeed succeeded in this endeavor.

Samizdat, Copyright, and the State: Copyright as Censorship and the Differences between East and West

DEBORA HALBERT

I lied to my students, and then I used to go home and drink, so as to forget their trusting faces! And later I understood: they knew I was lying and could do nothing but lie! That *such was my work*! I was selling my soul for consumption on and off the premises! I would take my pen—and it would automatically write lying words! And no one believed them, because they were printed in Russia and their author was not in prison. (Nikto, from a samizdat text)¹

Introduction

During the Cold War, the ideologically different methods of cultural production that existed in the Soviet Bloc and the West stood in stark contrast. The West claimed to be committed to a free market ideology that facilitated the free flow of information and culture uncensored by the state, and allowed creative artists to be critical of the state. The Soviet system, by contrast, required state-sponsored culture to be ideologically consistent with state socialism and engaged in state-based censorship to ensure alignment. The modes of creativity within these contrasting economic and political systems led to assertions about the authenticity of cultural creativity by both sides regarding the other.

To many, both inside and outside the Soviet Union, state-sponsored art could not be authentic because individual expression was limited by the system of state censorship. By definition, culture became propaganda

¹ Anonymous, *Nobody, or The Disgospel According to Maria Dementnaya/Nikto: A Samizdat Text*, trans. April FitzLyon (London: John Calder, 1975), 32.

and Soviet citizens could not access “real” art, literature, or news. While the state-supported artist may be able to make a living by producing art in the Soviet system, this person sacrificed his individual expression and the possibility of expressing views that were critical of the state. Thus, Soviet literature and art was widely regarded as propaganda by the West and thus disregarded as culturally relevant.

However, claims of art’s inauthenticity were also leveled at Western creators, both by those within the Soviet system and by many in the West. From the Soviet point of view, Western cultural production mirrored the ideological truths of capitalism. In a free market system, where artists must earn a living via the popularity of the market, many criticize artists producing corporate art, music, and culture as having “sold out.” Here too, the authenticity of art is questioned because individual expression is filtered through market forces. Thus, the culture of the West was no less ideological for being free of state censors, but simply reproduced a capitalist logic that was antithetical to Marxist–Leninist ideals. Censorship was also quite evident, at least in the United States, where artistic expression was limited by claims of obscenity and artists were blacklisted for their communist tendencies.

In order to understand the complexity of the landscape, we must also factor in the concept of samizdat, the underground world of literary and cultural production that was instrumental in resisting and critiquing the state during the Soviet period. Samizdat was self-published, and therefore circulated outside state and authorial control. As a result of its informal and underground status, it was not protected by copyright law, and even if copyright protection could be extended to samizdat, the works were copied, changed and circulated without the formal approval of the author, who was often anonymous, and thus existed in violation of many of the conventional protections awarded by copyright.

The postcommunist world has seen the adoption of Western-style copyright across all countries so that they would be aligned with international trade agreements. The expansion of these new copyright laws was driven by Western assumptions about how creativity must be protected and with the interest of protecting Western products abroad. The expansion of the concept of intellectual property in modern Europe is now virtually complete on a legal level. However, the existence of samizdat or any

self-published work helps to raise questions about the necessity of this expansion in terms of artistic creativity. What can samizdat highlight about the role of copyright law for creativity? When one creates outside the official system, what are the consequences in terms of authorship, ownership, and the possibilities of authenticity?

This chapter will explore and develop two interwoven arguments. First, the creation and role of samizdat literature and art in the former Soviet Union and its satellites tells us something about the motivation for creativity and what counts as authentic in a world governed by authoritarian states. Second, samizdat retains an important role in today's culture, where censors continue to use copyright as a tool to control expression, albeit under the guise of a "free market." Instead of resisting the force of an authoritarian system, what must be resisted today is the totalizing control copyright has extended over all forms of creativity and the idea that the only legitimate culture is that produced for economic reasons. What samizdat makes clear is that those who identify themselves as "true" artists and take controversial political stances very often do so without recourse to copyright. Furthermore, there is a need for a samizdat that confronts the overextension of copyright and helps to reframe the debate about creativity in the future.

Samizdat and the State

Samizdat is a shortened version of the word *samesbyaizdat*, meaning a "publishing house of oneself."² Typically, scholars date the emergence of samizdat in the years following Stalin's death, although the term itself was coined in the 1940s by Nikolai Glazkov.³ Limited works may have been circulated prior to the death of Stalin, but it was almost a decade after his death before the network through which samizdat was circulated became sufficiently developed.⁴ The general arc of samizdat publishing began in

² Gordon Johnston, "What Is the History of Samizdat?," *Social History* 24, no. 2 (1999): 122.

³ Leona Toker, "Samizdat and the Problem of Authorial Control: The Case of Varlam Shalamov," *Poetics Today* 29, no. 4 (2008): 738.

⁴ George Saunders, ed., *Samizdat: Voices of the Soviet Opposition* (New York: Monad Press, 1974), 57.

the 1960s and increased in intensity in the course of this decade, developing and expanding further in the 1970s and 1980s.⁵

Samizdat typically refers to texts written in Russian that circulated via informal channels inside the Soviet Union and were often brought outside the USSR for formal publication. In fact, the Russian émigré press was an important player in the circulation and growth of samizdat.⁶ These works became visible internationally because they were seen as authentic expressions of an otherwise stifled people. In addition to works by Russians, the unauthorized circulation of texts inside the Soviet Union included Western works. For example, Hemmingway's *For Whom the Bell Tolls*, and George Orwell's *1984* circulated in samizdat (an obvious copyright violation).⁷

Texts published on the subject of samizdat first peaked in the 1970s when samizdat reached a sufficiently critical mass. During the 1970s, an effort was made to expand the circulation of samizdat in the West. These publications sought to highlight creative and political expression behind the Iron Curtain. The second period of scholarly interest arose in the late 1980s and continued into the early 1990s during the political dissolution of the Soviet Union and the corresponding social uprisings. At this time, the political nature of samizdat and the future of Russia and the former Soviet satellite states were the focus of much debate.

During the 1980s, Valeria Stelmakh suggests, samizdat became more political as there was "a self-realization of unofficial culture and its institutionalization."⁸ Other authors go further by claiming that samizdat was essential to understanding national culture, for it made it possible to preserve it and to ensure that some of these works entered the European literary canon.⁹ It was assumed that samizdat addressed higher truths.

⁵ F. J. M. Feldbrugge, *Samizdat and Political Dissent in the Soviet Union* (Leyden: A. W. Sijthoff, 1975), 7–12.

⁶ Michael Meerson-Aksenov. "Introductory," in *The Political, Social and Religious Thought of Russian "Samizdat"*—*An Anthology*, ed. M. Meerson-Aksenov and B. Shragin, trans. Nickolas Lupinin (Belmont: Nordland, 1977), 28.

⁷ Valeria D. Stelmakh, "Reading in the Context of Censorship in the Soviet Union," *Libraries & Culture* 36, no. 1 (2001): 148.

⁸ *Ibid.*

⁹ Quoting Wolfgang Eichwede. Olga Zaslavskaya, "From Dispersed to Distributed Archives: The Past and the Present of Samizdat Material," *Poetics Today* 29, no. 4 (2008): 677–78.

Since the 1990s, few scholarly works have been written on samizdat in English. The literature on samizdat tends to focus on several key themes.

First, scholars classify the types of samizdat in circulation.¹⁰ Classification schemes break samizdat down into a variety of categories, including literary works, political tracts, memoirs, news, religious writings, individual complaints, and letters.¹¹ Radio Liberty in Germany became the archival home for samizdat during the Cold War, and a research team began organizing the collection into published volumes that could be more easily circulated in the West in the 1970s. This remains one of the most valuable collections of samizdat.¹² By 1972, they produced four volumes, each containing about six hundred pages. In the process of producing the volumes held by Radio Liberty, these works were also classified and archived for historical purposes.¹³

A second important theme in the literature is the political role of samizdat. While samizdat is understood to be political because of the conditions in which it was produced, much of what has been collected does not make any particular political point. Rather, its very creation is a political act because it was undertaken in resistance to a system of control that limited individual expression in favor of an official doctrine. In Eastern and Central European systems, civil society was completely absorbed by the state.¹⁴

The Soviet approach to media was to “liberate” it from capitalist ownership, as experienced by media in the West. According to their logic, the state acted as the expression of the people. Once the state (instead of private profit-making authorities) controlled the media, the press was presented as a tool for free expression by the people. They claimed that the use of censors to ensure ideological conformity was not inconsistent with free expression in the Soviet Union since, by definition, the state spoke for

¹⁰ Martin Machovec, “The Types and Functions of Samizdat Publications in Czechoslovakia, 1948–1989,” *Poetics Today* 30, no. 1 (2009): 1–26; Saunders, *Samizdat*; Feldbrugge, *Samizdat and Political Dissent in the Soviet Union*, 7.

¹¹ Johnston, “What Is the History of Samizdat?,” 126–27; Feldbrugge, *Samizdat and Political Dissent in the Soviet Union*, 7.

¹² Zaslavskaya, “From Dispersed to Distributed Archives,” 699.

¹³ Albert Boiter, “Samizdat: Primary Source Material in the Study of Current Soviet Affairs,” *Russian Review* 31, no. 3 (1972): 282–85.

¹⁴ Slavko Splichal, *Media beyond Socialism: Theory and Practice in East-Central Europe* (Boulder: Westview Press, 1994), 27.

the people. Censorship ensured that the media published the message of the state, and that it was devoted to “popularizing the ruling ideology and state policy,” much like educational systems do.¹⁵ Writers would submit their work to editors, as one would in the West, but editors were answerable to an additional authority, the Glatvit or state censor that determined what was appropriate for publication. The fact that the existence of the state censor was not officially recognized maintained a pretence that publication in the Soviet Union met some level of free expression.¹⁶

However, editorial decisions adhered to socialist realist doctrine, which sought to ensure that literature reflected the revolutionary struggle of the workers and the everyday lives of the people.¹⁷ Art and literature were produced despite the ideological conformity that was necessary to be an artist under the totalitarian systems, and those who chose to work within the system were not granted complete freedom to express themselves. The critique of totalitarian regimes is that this form of government, “transforms culture into a political means and thus makes the independent artist its enemy.”¹⁸

The Soviet censors ensured that officially published works met the criteria for ideologically appropriate readings in all genres from poetry to fiction to autobiography. This process, according to Stelmakh, was arbitrary because it was not grounded in any specific legal system. Instead, it was implemented prior to publication rather than after publication, and took place in secret and anonymously.¹⁹ Given that censorship was arbitrary, one could never be certain what would be allowed and what condemned. Most authors and editors therefore engaged in self-censorship in an effort to remain within the appropriate boundaries of Soviet thought.

Since publication was contingent upon appropriate content, and since there was little certainty about what appropriate content should be, many writers remained committed to getting their works into public

¹⁵ Ibid.

¹⁶ Joseph Gibbs, *Gorbachev's Glasnost: The Soviet Media in the First Phase of Perestroika* (College Station: Texas A&M University Press, 1999), 6–7.

¹⁷ Ann Komaromi, “The Unofficial Field of Late Soviet Culture,” *Slavic Review* 66, no. 4 (2007): 611.

¹⁸ Meerson-Aksenov, “Introductory,” 29.

¹⁹ Stelmakh, “Reading in the Context of Censorship in the Soviet Union,” 144.

circulation even after they had been deemed unacceptable for publication and rejected. As a result, other mechanisms of distribution had to be found. Samizdat in general was (and is) understood as a form of resistance regardless of the genre. This type of underground system of circulating texts gave rise to a narrative of the heroic author who spoke the truth in the face of overwhelming state power.²⁰

Samizdat was seen as a form of emancipation from the censors, that is, from internal censors as well as those within the Soviet state. Paradoxically, as the Czech author Ivan Klíma noted, state censorship helped to end self-censorship for many Czech writers because they began to write for samizdat free of control. However, such a process raises other questions about the act of writing. For example, does a writer write only for himself and a few others, or must the work be read to have meaning?²¹

A third theme dealt with in the literature concerns the way in which the existence and circulation of samizdat helped to develop the space from which resistance to totalitarian political regimes could emerge. Many argued that samizdat and the circulation of art and texts was instrumental in helping bring down the Soviet Union and other socialist states. Readers of samizdat were understood to be part of a literary elite, and the circulation of samizdat texts became essential to creating an alternative public sphere.²² This “unofficial culture” emerged autonomously in the Soviet Union as faith in the system declined and citizens sought to express themselves as individuals. Dissidents realized that they needed to write without regard for the norms of the state.²³ Meerson-Aksenov and Shragin speak of the emergence of a “dual consciousness” in which samizdat was able to help give birth to a social consciousness outside official culture.²⁴ George Saunders argues that what started as an underground literary movement became more organized and political.²⁵

²⁰ Ann Komaromi, “The Material Existence of Soviet Samizdat,” *Slavic Review* 63, no. 3 (2004): 600.

²¹ Ivan Klíma, “The Unexpected Merits of Oppression,” *Cardozo Studies in Law and Literature* 2, no. 1 (1990): 39.

²² Johnston, “What Is the History of Samizdat?,” 128.

²³ Komaromi, “The Unofficial Field of Late Soviet Culture,” 611.

²⁴ Meerson-Aksenov, “Introductory,” 22–24.

²⁵ Saunders, *Samizdat*, 35.

The articulation of another way of living, as circulated via samizdat, was enhanced by the fact that people living behind the Iron Curtain had limited access to Western books, television, movies, and music.²⁶ Much has been written about the use of soft power, both during and after the Cold War, as a tool for communicating the value of Western culture to those who live under different ideological systems.²⁷ Overall, most scholars of samizdat have argued that it played a crucial role in the creation of a space in which individual authors and the readers asserted autonomy and resistance, forged alternative public spheres, and provided critical impetus that helped to bring down the state. However, in order to do this, samizdat circulated without the protection of copyright law. The next section will examine more specifically the links between copyright and samizdat.

Samizdat, Authorship, and Controlling the Copy

The literature on samizdat is not particularly concerned with the issue of copyright, which is not surprising because samizdat authors had little recourse to copyright law. Despite its ideological opposition to private property, Russian copyright law was similar in scope and content to Western copyright law, with broader moral rights for the author and a much broader “free use” provision for the appropriation and circulation of useful

²⁶ *Disco and Atomic War*, dir. Jaak Kilmi (OU Eetriuksus and Helsinki Filmi, 2009). This documentary addresses the role of television in the presentation of an alternative vision of life that contradicted the official state version.

²⁷ David Scott, *Radio Free Europe/Radio Liberty and Voice of America: Soft Power and the Free Flow of Information* (Washington, DC: US Government Printing Office, 2009); Joseph S. Nye, *Soft Power: The Means to Success in World Politics* (New York: Public Affairs, 2004); George N. Shuster, “The Nature and Development of U.S. Cultural Relations,” in *Cultural Affairs and Foreign Relations* (Englewood Cliffs: Prentice-Hall, 1963), 8–40; Frank A. Ninkovich, *The Diplomacy of Ideas: U.S. Foreign Policy and Cultural Relations, 1938–1950* (Cambridge: Cambridge University Press, 1981); Frances Stonor Saunders, *The Cultural Cold War: The CIA and the World of Arts and Letters* (New York: New Press, 2000); Matthew Fraser, *Weapons of Mass Disruption: Soft Power and American Empire* (Toronto: Key Porter Books, 2003); C. Thomson and W. Laves, *Cultural Relations and US Foreign Policy* (Bloomington: Indiana University Press, 1963); Wilson P. Dizard, *Inventing Public Diplomacy: The Story of the U.S. Information Agency* (Boulder: Lynne Rienner, 2004); Nicholas Cull, *The Cold War and the United States Information Agency: American Propaganda and Public Diplomacy, 1945–1989* (Cambridge: Cambridge University Press, 2008).

knowledge, especially of scientific papers.²⁸ However, if an author chose to circulate a work in samizdat, it went directly to the public domain.²⁹ Once in the public domain, the author could assert only limited control over the work. The more serious consideration was how copyright law could and would be used as a tool for censorship.

By studying samizdat one may realize how irrelevant copyright law can be for the production of artistic, political, and cultural works. The choice to self-publish reveals the extent to which samizdat contradicts the justifications made in the West for the extension of copyright law to an author, suggesting that truths about ownership and control should be subject to ideological scrutiny. One justification for copyright is to argue that the author requires control of the copy in terms of its duplication and circulation, none of which can be controlled once a work is in samizdat. A second justification is that the author requires control of the text in terms of its authorial authenticity and its accuracy as the expression of the individual author's ideas, typically understood to be moral rights claims. However, it is not possible to police these once a work enters the world of samizdat. By describing how samizdat was produced and shared, one may understand more clearly how it undermines copyright protection and the fundamental principles upon which Western copyright law is based.

An author whose work was circulated as samizdat may have initially sought to publish with a traditional press, but then failed to meet the requirements of the (government or editorial) censors. Several options would be possible in this case. If the text was deemed important, even if it did not meet the criteria of the censors, an editor, printer, or employee of the press may take the manuscript, copy it and circulate it informally. The author may not know that the text had entered circulation, and in many cases would not have provided approval. Having released their work from other sources, authors may deny knowing that their texts were in circulation. Of course, this did not prevent Andrei Sinyavsky and Yuli Daniel, whose works were published abroad without authorization, from being arrested, tried and convicted in 1965 and 1966.³⁰ However, it is likely that

²⁸ Peter B. Maggs, "New Directions in US-USSR Copyright Relations," *American Journal of International Law* 68, no. 3 (1974): 391-409.

²⁹ *Ibid.*, 409.

³⁰ Komaromi, "The Unofficial Field of Late Soviet Culture," 608.

poet and writer Varlam Shalamov's most famous work, *The Kolyma Tales*, was sent abroad for publication by editors who could not publish it locally, which was done without the author's knowledge.³¹

Upon rejection, authors may themselves initiate the process of putting their work into samizdat. Quality is relevant in self-published works. While the state-based censorship of ideas is unacceptable, editorial decisions about quality are generally considered to constitute an acceptable reason to reject works for publication. Editors serve as gatekeepers to formal publishing, and authors who do not meet the literary standards of the press will have to look elsewhere. In samizdat, as Martin Machovec notes, "even utter graphomaniac prattling, babbling rubbish must be granted the status of a samizdat publication, provided it meets all the given criteria; and in theory it would be punishable as a result."³² Thus, it is not the case that everything that was self-published met high literary standards.

Some authors may have simply circumvented the formal publishing process altogether and taken their works directly to the samizdat process. Certainly for those engaged in active dissent, this option was the most likely. However, given that the borderline between authorized and unauthorized texts was unclear, it made sense in some cases (particularly in the Soviet Union) to avoid formal publication altogether. These works could be smuggled out of the system for publication in the West, but they never sought publication via formal communist channels.

A final option open to authors was that they could simply retain their manuscript without seeking to circulate it. In some cases, even possession of an illegal manuscript could be dangerous, as was the case in Czechoslovakia. Possession of any manuscript perceived as "antistate," "antigovernment," "antisocialist" or "anticommunist" could result in punishment.³³ Of course, writers write to be read, which is why the final option begs the question why one would engage in the writing process at all if the work would never be read.

Regardless of the method by which a work entered samizdat circles, the end result is that the author lost control of both the copy and the

³¹ Toker, "Samizdat and the Problem of Authorial Control," 741.

³² Machovec, "The Types and Functions of Samizdat Publications in Czechoslovakia," 6.

³³ *Ibid.*, 6–7.

distribution of the copy. Once in the public domain, the work could be reproduced without permission. In fact, from a political perspective, it was better if the author could claim that the work circulated without their permission. Moreover, many authors published anonymously in order to avoid possible prosecution for their ideas. However, one genre—the signed open letter offering an individual’s thoughts on a key state issue—was considered a brave act by scholars, but also speaks to a type of individual freedom of thought that “represents, the greatest internal freedom, a complete independence not only from government but from various groups which, for example, determine limits of press accessibility in the West.”³⁴

Authors faced the choice of either having their work read by readers, or more clearly managing the dissemination of the work by controlling the copy and formal publication channels. Samizdat raises the question of the motivation of the author if it is not commercial.³⁵ Gordon Johnson argues,

An important corollary of this is that the “author” is highly unlikely to be motivated by commercial considerations, which in turn opens up the question as to what is it that motivates authors to participate in non-commercialized exchanges and the extent to which they have any choice in the matter. An author could voluntarily donate his or her work because no other publication was available. Alternatively an author might be unaware that his or her work has been published and a further possibility is where an author makes a conscious decision to publish, rejecting more lucrative opportunities. All of these factors need to be taken into account when considering Samizdat authors alongside decisions to write but not to publish (“writing for the drawer”), or only to publish abroad.³⁶

From the perspective of those who entered the world of samizdat, the choice appeared to be clear. The impulse to be read and to engage in authentic self-expression without a state censor was greater than the impulse to control the copy with the associated remuneration.

³⁴ Meerson-Aksenov, “Introductory,” 32–33.

³⁵ Johnston, “What Is the History of Samizdat?,” 121–22.

³⁶ *Ibid.*, 121–22.

In terms of current Western copyright philosophy—that in order to encourage the creation and distribution of works, one must extend to the author copyright protection over anything “fixed in a tangible form”—samizdat is not explainable. Samizdat undermines much of what we claim about moral rights as well as control over the copy. In some circumstances, these boundaries become more fluid than they are currently claimed to be.

For a work to enter circulation, copies had to be made. Samizdat copies were made in one of the following ways. They may have been hand-copied on paper from an original document. They may have been typewritten on very thin paper in order to make as many carbon copies as possible. Later, they may have been photographed and reprinted or photocopied, although photocopy machines were often avoided for fear of being found out.³⁷ Meerson-Aksenov provides the example of a couple who systematically photographed as much samizdat as they could acquire, made microfilms of these documents and then kept them hidden in a secret repository of samizdat works.³⁸ All of these methods, however, meant that the number of copies, the people who copied texts, and the distribution of copies were beyond authorial control. Someone who received a samizdat text could reproduce additional copies for further distribution, which meant that it was impossible to track the flow of these informal documents. Furthermore, these unofficial texts were technically illegal in some countries, and could result in the prosecution of the author if found out.³⁹

Samizdat works could reach the West, where they were published by official publishing houses or journals.⁴⁰ One of the interesting outcomes of the circulation of samizdat texts and the ways in which each copyist may either inadvertently or deliberately change the words of the original, is that samizdat becomes a form of collective authorship. Komaromi notes, “we would do well to abandon a modernist conception of autonomy that depends exclusively on the individual and the fixity or inviolability of the text or idea.”⁴¹ The anonymity of the authors and the means of circulation meant that one could not ascertain authorship absolutely. However,

³⁷ Machovec, “The Types and Functions of Samizdat Publications in Czechoslovakia,” 5.

³⁸ Meerson-Aksenov, “Introductory,” 39.

³⁹ Johnston, “What Is the History of Samizdat?,” 123.

⁴⁰ *Ibid.*, 131.

⁴¹ Komaromi, “The Unofficial Field of Late Soviet Culture,” 624.

Saunders suggests that authenticity in samizdat is about reaching toward a higher “historical truth,” such that even if the end product was collectively authored as the samizdat text is copied, recopied, and inevitably revised, it still evokes a more general truth and authenticity.⁴²

The works of Shalamov were a case in point. While typists may have sought to remain true to the original text, there were ways in which authorial intention was disregarded in the samizdat process. Typists would also become “self-appointed editors.” In the end, “attempts to ‘edit’ Shalamov’s individual style amounted to misunderstanding his painstakingly protected authenticity; this, unfortunately, is also characteristic of some of the translations of his works into other languages.”⁴³

Such examples disrupt the underlying assumptions of Western copyright law alongside morally grounded arguments about the rights of authorship. They also reveal the role played by editors in the final text, even within the Western context, where the author’s works are changed during the editorial process. Furthermore, as Komaromi argues, “copyists introduced degrees of remove from the original author. The technological exigencies, as well as the idiosyncratic editorial license, altered the message transmitted, sometimes significantly.”⁴⁴ In many ways, copyists and readers became editors and authors. This so-called “wild samizdat” means that multiple versions of a text may exist, given that typists not only retyped and used the works of authors, but changed these to fit their own uses and imaginations.⁴⁵

Authors lost control of their works in the process of creating samizdat. However, it is difficult to assess how much control was willingly abdicated. It seems that authors publishing in samizdat ascribed greater value to being read than to being compensated or retaining absolute control. Truth, in this context, transcended economic transactions. The circulation of ideas via texts certainly placed the role of authorship outside the boundaries of copyright law. However, some things seemed to be more important than property rights.

⁴² Ibid., 59–60.

⁴³ Toker, “Samizdat and the Problem of Authorial Control,” 743.

⁴⁴ Komaromi, “The Material Existence of Soviet Samizdat,” 604.

⁴⁵ Machovec, “The Types and Functions of Samizdat Publications in Czechoslovakia,” 14.

The Role of Copyright in Totalitarian States

Although private property rights for creators appear to be incompatible with the philosophy of Marxism–Leninism, both Russians and Soviets introduced intellectual property laws.⁴⁶ These systems were designed to support a socialist model of creativity and strike a balance between public good and the individual by ensuring state maintained control over creative work while at the same time allowing for scientific work to be collaboratively owned.⁴⁷

Copyright in Russia during Soviet rule was different in degree but not in kind from Western style copyright laws. Soviet copyright law was enacted in 1925 and created the socialist paradigm for copyright protection. These concepts were incorporated into the Russian constitution of 1977, which “guaranteed Soviet citizens freedom of scientific and artistic creation in accordance with the goals of communist construction.”⁴⁸ The system provided for the public use of works that could be beneficial to the progress of society via free use. The Soviets, however, ascribed more support to moral rights than the Americans.⁴⁹

The role played by copyright in censoring material is often overlooked, or else not subjected to close investigation. In the United States, the influence of copyright on free speech has already been investigated, and the US Supreme Court decreed that copyright and free speech are not intrinsically contradictory.⁵⁰ However, critical analysis of the way in which copyright functioned in the Soviet system shows what methods were applied to ensure that copyright and censorship are compatible.

The Soviet system had general criminal laws prohibiting speech, writings, and activities that were critical of the government. Samizdat was not specifically named in Soviet criminal code, but the trial of Sinyavsky and

⁴⁶Michael A. Newcity, *Copyright Law in the Soviet Union* (New York: Praeger, 1978); Pauline B. Taylor, “Recent Developments in Soviet Copyright Policy,” *The Russian Review* 32, no. 4 (1973): 421–24.

⁴⁷Susan Tiefenbrun, “Piracy of Intellectual Property in China and the Former Soviet Union and Its Effects upon International Trade: A Comparison,” *Buffalo Law Review* 46 (1998): 46–47.

⁴⁸*Ibid.*, 47.

⁴⁹*Ibid.*, 50; Maggs, “New Directions in US–USSR Copyright Relations,” 80–83.

⁵⁰Neil Weinstock Netanel, *Copyright’s Paradox* (Oxford: Oxford University Press, 2008); Golan v. Holder, 132 873 (S. Ct. 2012).

Daniel over the publication of their work abroad suggests that prosecution for such works was possible. Their trial was conducted on the basis of Article 70 and Article 190-I, neither of which specifically targeted samizdat.⁵¹ Feldbrugge argues that the domestic production of samizdat falls under Soviet copyright law, which covers tangible works involving creativity.⁵² In order to explain the notion that unofficial channels of copying and distribution violate copyright, Feldbrugge argues that,

Normal samizdat procedure should therefore be regarded as the transfer by the author of the right of further reproduction to the first and subsequent “generations” of receivers of the copies of his work. One should take for granted that every Soviet author who launches his work into samizdat knows how the system works. Well-known Soviet authors, such as Solzhenitsyn, whose works regularly appear in samizdat in the Soviet Union have never claimed that their copyright was infringed by the samizdat procedure.⁵³

Feldbrugge goes on to argue that samizdat does not entail internal copyright problems because neither authors nor the Soviet government claim that it was illegal to circulate works in this manner.⁵⁴ However, if copyright protects an author’s work and the unauthorized circulation of a work in samizdat violates copyright, then the government could use the law to stifle the circulation of the work, even if it had not done so.

The international process was different. Once the Soviet Union joined the Universal Copyright Convention (UCC), also known as the Geneva Convention, in 1973, it became possible to use international copyright law as a tool for censorship.⁵⁵ The goal was to join the international copyright convention in order to promote legal tools that would halt the publication of samizdat abroad.⁵⁶ Furthermore, the creation of the Soviet Union Copyright Agency, which dealt with the copyright interests of both

⁵¹ Johnston, “What Is the History of Samizdat?,” 123.

⁵² Feldbrugge, *Samizdat and Political Dissent in the Soviet Union*, 23–24.

⁵³ *Ibid.*, 24.

⁵⁴ *Ibid.*

⁵⁵ Johnston, “What Is the History of Samizdat?,” 123.

⁵⁶ Feldbrugge, *Samizdat and Political Dissent in the Soviet Union*, 23–24.

domestic and foreign authors, included the state in international copyright agreements. After the creation of the copyright agency, any agreement with a foreign publisher that did not go through the agency would make the Soviet author or press liable to legal punishment.⁵⁷ While Feldbrugge notes that only those authors whose names were associated with their samizdat texts could be targeted, the underlying intent of the UCC was to establish a system of control over the circulation of samizdat texts, especially abroad. Thus, by joining the UCC the Soviets were able to exert a form of censorship over samizdat works that had not been available to them before.⁵⁸ According to Feldbrugge:

A trickier situation occurs in the case of Western publication of a samizdat work by a known Soviet author. In that case, it is conceivable that the Soviet authorities might ask the author whether the work was published with his permission. If the author answers affirmatively he is liable to prosecution. If he denies to have given permission the authorities may pressure him into prosecuting the Western publisher in his own country.⁵⁹

To the Soviets, copyright was another regulatory tool that made it possible for the state to exert power over authorial expression.

Since little has been written about the nexus of copyright and samizdat, it is difficult to know to what degree it helped or harmed authors. However, it is clear that the laws of copyright allowed the state to control content, and that authors had to give up much of what is extended to them in the form of “rights” under copyright law if they wanted their works to be circulated and read. Copyright slows down the circulation of a text and allows it to be reproduced and circulated only within the regulatory mechanisms of the state and the author. It served as a barrier to the free circulation of samizdat texts, which, of course, inhibited its larger political function, which was to challenge the political status quo.

⁵⁷ Ibid., 24.

⁵⁸ Ibid., 25.

⁵⁹ Ibid., 25.

The Internet, Samizdat, and the Politics of the Future

When the Soviet system derailed, so too did the overt censorship of the state. Stanisław Barańczak, writing in 1990, observed that if the former Eastern Bloc adopted a new democratic culture, the implications for how artists support themselves and the type of work they produce would be very extensive.⁶⁰ Authors lived in a “velvet prison” and as long as they avoided confronting the state, they could produce the required entertainment for the masses. What concerns Barańczak is that, besides the open dissidents from the old system, the sudden disappearance of state-sponsored creative work and its overnight replacement with a profit-making Western-style publication system would rid most if not all creative people of the means to continue producing cultural works.

The free market would also mean that most people would not be able to afford to purchase literature even if authors produced it.⁶¹ In an assessment of the press after 1990, Ivan Zassoursky confirms Barańczak’s fears about the role of the market in the production and circulation of information. Media outlets found it very difficult to survive as a result of the costs of publication.⁶² As in the West, culture became measured by its ability to make profits, and the emphasis on what to publish shifted from literature and poetry to forms of entertainment that provided enjoyment to the masses.⁶³ Debates of the 1990s focused on this struggle to redefine the media landscape, to shift from state-centered models to privatized models, and to build (or rebuild) means of communication. However, a new concern emerged. While the world espoused the benefits of the Western model of a marketplace of ideas and an uncensored press, this Western model underestimated “the tendencies toward mental homogenization and monopolization inherent in a market-driven media system and the way in which media organizations do not make themselves accessible to nonprofessionals.”⁶⁴

⁶⁰ Stanisław Barańczak, “Goodbye, Samizdat,” *The Wilson Quarterly* 14, no. 2 (Spring 1990): 60.

⁶¹ *Ibid.*, 64.

⁶² Ivan Zassoursky, *Media and Power in Post-Soviet Russia* (Armonk: M. E. Sharpe, 2004), 52.

⁶³ Barańczak, “Goodbye, Samizdat,” 65.

⁶⁴ Splichal, *Media beyond Socialism*, 36.

As the totalitarian regimes of Central and Eastern Europe struggled to create and sustain a free press and to develop cultural expressions free from state control, the Internet began its meteoric rise and transformed the way in which information and culture was created and shared. Eastern European states did not provide access to information technology on a comparable level as that in the West during the early 1990s.⁶⁵ However, Western media corporations began to prioritize the enforcement of a Western idea of intellectual property on the basis of the rudimentary modes of sharing available. In part, intellectual property became a relevant consideration because the free circulation of Western programming allowed during an ideological cold war needed to be brought under the control of its owners. Another dimension of the rising intellectual property battles emerged from the fact that the Soviets sought to use what the West calls “piracy” to develop the technologies necessary to be competitive in the information age.⁶⁶

Given that Russia had a more generous understanding of “free use” for collective purposes, it did not prioritize the enforcement of Western copyright laws domestically. The Internet and new digital technologies made it possible for Russians to access Western video and computer programs at very affordable rates.⁶⁷ Russians used the Internet to free culture from both past censorship and from prohibitively high present costs of publication. Maksim Moshkov, for example, set out to create a digital library of Russian works that could be shared both within and beyond Russia for Russian-speaking readers. However, his efforts were thwarted by copyright law. Since his aim was to share Russian culture, he posted digitized versions without permission and then offered authors the right to have them removed if they disagreed with having their works visible on the Web site (a process unlikely to succeed today, as Google Books has demonstrated). He thus created an important cultural resource, albeit by merely offering a more “flexible” approach to copyright law.⁶⁸ The Internet unleashed the possibilities of cultural exchange in Russia and exchange

⁶⁵ Ibid., 48–49.

⁶⁶ Mira Sundara Rajan, *Copyright and Creative Freedom: A Study of Post-Socialist Law Reform* (London: Routledge, 2006), 160–61.

⁶⁷ Zassoursky, *Media and Power in Post-Soviet Russia*, 162.

⁶⁸ Ibid., 164–65.

with those abroad. Many were quick to adopt this new way of sharing information.

Given the methods of control and censorship that continue to influence the circulation of texts, especially the unspoken ones that bypass copyright law, Zassoursky notes that the Internet has become the new medium of samizdat.

Although this is happening quite slowly, the Internet is now playing the primary role of permitting the survival of diversity in the information system and of expediting communication for the people who find this really necessary. Against the backdrop of the reconstruction of the image of Great Russia, an image that dominates the symbolic field, it is also sufficient that the Net allows communities and reference groups to exist outside the boundaries of political discourse and to work out their own cultural codes. Combining the role of samizdat with the social communications industry, the Net is perhaps required more by a vocal minority than by a silent majority. But in some cases (for example the war in Chechnya), this is already very important, since it leaves a window of freedom in the communications system, and does not allow the majority to drive dissidents into a “spiral of silence.”⁶⁹

The role of samizdat is still essential. However, technological advances make it possible to more rapidly circulate both unpublished and unauthorized writings and forms of political resistance, and to reach more readers than could the older generation, who were hampered by the speed at which they could type or copy by hand the relevant texts. While there are multiple ways of discussing these issues, I will focus on two, namely the forms of resistance made possible by the Internet (such as the role of WikiLeaks in the confrontation of secrecy and state authority) and the growing role of user-generated content and e-books as self-published works.

⁶⁹ Ibid., 184.

Samizdat, the Internet, and Political Resistance

Political commentary on the Arab Spring movements and the role of social media in the formation of political resistance to authoritarian regimes across the Middle East abounds.⁷⁰ Most agree that while technology can facilitate and support revolutionary change, authoritarian regimes can also use technology to stifle and repress resistance. Thus, while technology may be helpful, it is not sufficient to overthrow repressive regimes. One must also be aware of the larger media ecology, the effect of face-to-face activism, and the existence of grassroots prodemocracy processes.⁷¹

That being said, social media helps people to circumvent the power of the state by providing citizens with opportunities to connect directly with each other. Furthermore, it becomes possible to forge international relationships with supporters, and to provide a level of visibility for acts of resistance that is not available if the communication of revolutionary actions were left to traditional media channels. Srinivasan and Fish, who conducted fieldwork associated with the revolutionary struggles in the Middle East, consider that Internet authorship plays a significant role in the forging of alternative public spheres and resistance forces to the state. They note that “this power of Internet authorship and its coordination via social media platforms was evidenced in the toppling of the Bakiyev regime in April 2010, in which one of our informants, perhaps the nation’s most famous dissident blogger, emerged as the spokesperson and chief of staff for the transitional government.”⁷²

Internet authorship is a form of modern samizdat. Political writing, if unauthorized and circulating without copyright control, fits squarely within the domain of traditional samizdat. These are the types of documents that dissidents want to have in order to highlight state injustices. Despite efforts to expand copyright protection globally, the political writing of activists helps to demonstrate what earlier forms of samizdat

⁷⁰ S. Sardar and A. Shah, *Sandstorm: A Leaderless Revolution in the Digital Age* (Global Executive Board, 2011); L. Anderson, “Demystifying the Arab Spring,” *Foreign Affairs* 90, no. 3 (2011): 2–7; John Pollock, “Streetbook: How Egyptian and Tunisian Youth Hacked the Arab Spring,” *Technology Review*, October 2011, <http://www.technologyreview.com/web/38379/>.

⁷¹ Ramesh Srinivasan and Adam Fish, “Revolutionary Tactics, Media Ecologies, and Repressive States,” *Public Culture* 23, no. 3 (2011): 505.

⁷² *Ibid.*, 507.

achieved—that noncommercial authorship does not require copyright protection in order to provide an incentive, and that being heard is more important than controlling ownership over what one has written.

While global social protest and Internet communication more generally are parts of a new samizdat, WikiLeaks demonstrates the importance of publishing information as a form of political resistance. Even “democratic” states engage in censorship and control tactics, which the Internet circulation of documents can disrupt.⁷³ The even more recent revelations by Edward Snowden and his efforts to seek asylum from the United States government for his whistle blowing is additional evidence of democratic states seeking to control information about their own secret activities.

WikiLeaks, a nonprofit Web site dedicated to disclosing information that its makers consider should be public, has run into trouble with governments, banks, and religious institutions following the disclosure of confidential information. States tend to claim that disclosure violates national security interests. The publication of US embassy communications in 2008, for example, was considered by the US government to be a breach of national security. Although WikiLeaks had been publishing private communications for years prior to this, this set of documents brought it prominent international attention. States take action in the name of national security, while others seek to stifle WikiLeaks on grounds of copyright infringement.

Both the Church of Scientology and the Church of Jesus Christ of Latter-day Saints (the Mormon Church) have claimed copyright infringement for the publication of church-related documents on the WikiLeaks Web site. Perhaps the most well-known example of the use of copyright to halt the publication of private information was made by the bank Julius Baer when it sought to use copyright infringement to halt the disclosure of private bank documents in 2011.⁷⁴ There are many ways of implementing censorship via copyright, and WikiLeaks highlights the tension between institutional efforts to secure “owned” knowledge and the impetus to

⁷³ Claire Ulrich, “The Coming Age of Internet Censorship—WikiLeaks,” *WikiLeaks*, 18 June 2009, http://www.wikileaks.org/wiki/The_coming_age_of_internet_censorship.

⁷⁴ “Wikimedia Foundation Receives Copyright Infringement Claim from Mormon Church,” *Wikinews*, 13 May 2008, http://en.wikinews.org/wiki/Wikimedia_Foundation_receives_copyright_infringement_claim_from_Mormon_Church.

disrupt these power hierarchies by allowing everyone access to knowledge. Expansion of copyright as a concept inevitably entails the use of copyright to limit access to knowledge.

These political efforts suggest that the circulation of texts (even those unauthorized by the state or their authors) is an important tool of political resistance. While copyright is highly compatible with market economies, where it is assumed that everyone publishes for profit, it does nothing to facilitate political resistance against state domination. Instead, copyright can be used as a tool to curb the exchange of information. Such knowledge means that those interested in a more free and open society should be wary of extending copyright too far. Furthermore, the state of the world suggests that there is a need for samizdat that circulates without the control of authors or owners, and instead contributes to a better understanding of how one might express truth in the face of power.

WikiLeaks deals with public access to information within a political setting that attempts to disrupt the control of the state, religious institutions, and financial institutions. It pursues its mission with a sense of public obligation and is part of an effort to usher in more accountable, transparent, and democratic institutions. To that end, seeing its work as a modern samizdat corresponds to our understanding of the underlying political sensibilities of resistance. A second avenue for a new samizdat is access to the new and burgeoning self-publication system associated with digital books, e-book readers, tablets, and other electronic reading devices. These new systems of publication constitute the devolution of control from publishers to readers and a resurgence of self-publication. Furthermore, the Internet has given rise to blogs, chat rooms, new media outlets, and offers a publication venue for zines, while generally shifting the focus from publishers to authors.

While not called censorship, editors and publishing houses retain substantial control over public discourse by determining what can and cannot be published. Even without state-centered systems of censorship, it has historically been very difficult to publish outside what are the given “norms” of a culture. Small radical, anarchist, and feminist presses emerged in part to offset the control exerted by major publishing houses. As these publishers centralize (a process that is aided by the consolidation of copyright ownership) the subtle role of market control and its resistance

to the management of the “marketplace of ideas” becomes apparent. However, given that publication houses filter what can be published by their assessment of its profitability, they effectively foster a form of acceptable censorship for legitimate capitalist reasons.

The concern of most book companies is increasingly to make money. Works are rejected because they are not considered to have sufficient market value, regardless of their literary merit. In many cases, books with little literary merit are published while those that are qualitatively better will not find an outlet because of market considerations. The value accorded to editorial control in traditional publication channels meant that, until recently, self-published works were considered to be inferior because they failed the editorial tests of the major publishers. However, the possibility of self-publication, self-promotion and the circulation of texts beyond the publishing industry (via electronic books and e-readers) is changing the nature of book publication and circulation and now reflects closely the way in which samizdat circulated in the Soviet Union.

Such systems of production and distribution disrupt the traditional media ecology because authors do not need to use publishers. The introduction of tablets and e-readers has begun to change the way in which people read. By making content available on these electronic devices, traditional publishers can be bypassed as aspiring authors self-publish for electronic formats and distribute their works via the Web. These authors can focus directly on consumers, retain their copyright, and sell directly via Amazon or other e-book sellers. The institutional power of publishing houses, which control copyright, ownership and the circulation of texts, is undermined by these new media possibilities. Furthermore, the Western bias against self-publication may be disrupted as more people choose to speak directly to their readers.

Conclusion

Meditation on copyright, while focusing on samizdat to illustrate the relationship between creativity, sharing ideas, politics and the state, highlights what has often been forgotten in the recent copyright wars—that ideas, expressions, cultures, and visions are worth expressing and sharing

not *because* of, but *despite* the presence of copyright law. The impulse to express oneself and be read is central to the creation of culture. Samizdat demonstrated that, even in the face of authoritarian structures, which offered only limited spaces for personal freedom, the circulation of ideas beyond the scope of control was central to the construction of an authentic culture, where ownership of ideas was of secondary importance.

The increasingly wired world allows everyone to engage in samizdat as self-publishing. Despite the efforts of copyright owners to retain control over the circulation of ideas in the information age, these controls have broken down. First, on a political level, as states increasingly seek to censor the Internet, it still remains a venue for political discourse that transcends all state gatekeepers. This venue must be defended. Second, on a commercial level, the mainstream and consolidated print-based market today has to compete with the burgeoning world of self-publication and online publication that offers authors more control of their work and the ability to simply post ideas via blogs, video, or social media outlets. Entire new media ecologies can be created, and the peer-to-peer circulation of ideas and entertainment has become possible. Gatekeepers of the culture industry are threatened by these changes and increase their efforts to pass even more restrictive and controlling copyright and antipiracy legislation.

In both cases, copyright is a tool for censorship and control rather than a support structure for the circulation and exchange of ideas. As the state and the culture industry render these controls more stringent, many strive to ensure that culture flows around the barriers constructed by copyright. In the wake of samizdat, piracy now more effectively defines the way in which contemporary works circulate without appropriate authorization. Anonymous and WikiLeaks have become the new political forces that facilitate the circulation of ideas and the development of political resistance worldwide.⁷⁵ Samizdat teaches us that the flow of ideas without strict authorial or copyright control has the power to change the world.

⁷⁵ Sebastian A. Stern, "The New Fourth Estate: Anonymous, Wikileaks and -archy," *Center for a Stateless Society*, 27 January 2013, <http://c4ss.org/content/16677>.

PART III

Postsocialism: Renegotiating Copyright Norms in Europe

The Influence of EU Copyright Harmonization Directives on the Construction of Postsocialist Copyright Law in Central and Eastern Europe

ADOLF DIETZ

In the years following 1989, the former socialist countries of Central, Eastern and Southeastern Europe (hereinafter called “the Eastern European countries”) underwent a remarkably rapid transition to democracy and market economy. As a consequence, they not only had to undertake the necessary political reforms, but they also had to introduce important reforms in many individual fields of law, in particular, the field of intellectual property law, including, of course, copyright law. Thus, a whole wave of new copyright laws came into being in these countries during the legislative prolificacy of the 1990s.¹

Of course, copyright protection existed in all these countries during the socialist period prior to 1989. A number of them, such as Bulgaria, Hungary, Poland, Romania, the former Czechoslovakia, and the former Yugoslavia had, for quite some time, been signatories to the ancient and venerable Berne Convention on the Protection of Literary and Artistic Works (dating originally from 1886 and revised in Paris in 1971)²; a fact that should have guaranteed a minimum standard of protection as prescribed by international convention law. To a lesser degree that is also true for the former Soviet Union and its fifteen federated republics (independent states since 1991) which, in 1973 signed the original 1952 Geneva text of

¹ For the first legislation, which was later amended or even replaced, see Adolf Dietz, “Trends in the Field of Copyright Law in the Countries of Central and Eastern Europe,” *Revue Internationale du Droit d’Auteur (RIDA)*, no. 162 (October 1994): 121–25; see generally also Artur-Axel Wandtke, ed., *Urheberrecht in Mittel- und Osteuropa. Handbuch mit Einführungen und Rechtstexten*. Teil I: *Bulgarien, Polen, Rumänien, Russische Föderation, Slowenien* (Berlin: Berliner Wissenschafts-Verlag, 1997); Teil II: *Estland, Lettland, Litauen, Tschechien, Ukraine, Ungarn* (Berlin: Berliner Wissenschafts-Verlag, 2002).

² For details, see Dietz, “Trends in the Field of Copyright Law,” 126.

the less demanding Universal Copyright Convention, but not the Berne Convention.

Compared to the much more modern systems of copyright protection in existence elsewhere, in particular in Western Europe, the former socialist protection systems were rather underdeveloped. However in view of certain characteristic political and economic features of the countries concerned, such as the dominance of state enterprises and state organizations in the cultural sector (and almost all other sectors)³ there was no true copyright market.⁴ This can be explained in two ways: first, copyright as an exclusive right (and similarly exclusive patent rights) had no real function to fulfill, the most important element was the amounts paid to authors according to certain regulated tables of remunerations in the case of state organizations, such as publishing houses, using the works.

Second, apart from that rather political aspect, the former socialist countries struggled to resolve issues regarding the emergence of modern technologies and devices relevant to copyright in the second half of the last century. This refers, for example, to new areas of protection such as computer programs and databases, or new forms of exploitation such as rental and lending of works, private copying, reprography, cable, and satellite. The simple explanation for that particular lack of modernity is that it reflected the poor general availability of modern consumer goods and of corresponding technical facilities during the socialist period. Hence the need for specific copyright regulation in those fields was hardly deemed necessary at that time. But even in the traditional field of copyright regulation the situation was often characterized, partly for ideological reasons, by a rather limited degree of protection. For example, the period of protection after the author's death was sometimes very short; in the former Soviet Union it was, for a long time, only fifteen years p.m.a, later extended to twenty-five,⁵ whereas the international standard was fifty and later seventy years after the author's death.

³ See Michiel Elst, *Copyright, Freedom of Speech, and Cultural Policy in the Russian Federation* (Leiden: Brill, 2005), 19ff.; see also 247ff., concerning first attempts at improvement in the perestroika period following 1985.

⁴ See Dietz, "Trends in the Field of Copyright Law," 128; for the situation in the former Soviet Union in particular, see Elst, 26ff.

⁵ For more details, see Dietz, "Trends in the Field of Copyright Law," 128; Elst, *Copyright, Freedom of Speech*, 80ff. and 436ff.

As a result, starting from that inadequate regulatory *status quo ante* the postsocialist copyright legislators had a twofold task: they had to adapt the old copyright system to the necessities of a modern market economy and, at the same time, they had to find answers to the new problems raised by the technological, economic, and social developments. In addition to that, the newly independent states that had formerly been federated republics within the Soviet Union, Czechoslovakia and Yugoslavia had to find their own solutions, although the old (Soviet, Czechoslovak, and Yugoslav) law was still applied for an initial transitional period. In short, transformation and modernization were the two main challenges confronting legislators when drafting new copyright laws after the upheavals of 1989. Since most previous copyright laws were no longer suitable even as a starting point, the legislators had to look for other, hopefully better, models and solutions, and they did find them, to a large extent in Western Europe.

The General Influence of the Continental European Copyright Model and the Characteristics of the New Copyright Laws

From a comparative point of view, leaving aside the specific features of the former socialist system, all Eastern European countries traditionally belonged, and still belong to, the civil law family. No wonder then that, in systemic terms, the new copyright laws they eventually adopted in the years after 1989 structurally very much resemble the type of copyright legislation common in many continental European countries such as France or Germany and which, with a few exceptions, were already existing members of the EU or have since become so.

Copyright legislation in countries with a system of civil law tends to safeguard the author. That means, more concretely, that the new laws were, and still are, regularly based on the so-called creator principle (the author being, with rare exceptions, the original owner of copyright); also that, in addition to the bundle of exclusive exploitation rights, authors are granted a number of moral rights and, finally, that rules for copyright contracts and for the activities of collecting societies are well-established and are more or less binding.

Due to their recent formation, many of the new postsocialist Eastern European copyright laws⁶ (at least in paper form) are markedly modern with pronounced author safeguards in place, in many cases stronger than their models, the generally much older Western European laws. Typical examples for that conspicuous modernity, in terms of structure as well as of content, are the Polish Copyright Law of 4 February 1994,⁷ the Slovenian Copyright Law of 30 March 1995,⁸ the Hungarian Copyright Law of 22 June 1999,⁹ or the Czech Copyright Law of 7 April 2000.¹⁰

⁶ English translations of the copyright laws (as mentioned below) in their original or amended versions (however not always the most recent versions) can be found in WIPO Lex, an electronic database which provides access to intellectual property (IP) laws and treaties of the Members of WIPO, the World Trade Organization (WTO) and the United Nations (UN): <http://www.wipo.int/wipolex/>.

⁷ See, generally, Janusz Barta and Ryszard Markiewicz, "The New Polish Copyright Act: Standards and Particularities," *International Review of Industrial Property and Copyright Law* 26, no. 3 (1995): 337–50; A. Dietz, "Part Polen/I," in *Quellen des Urheberrechts*, ed. R. M. Hilty et al. (Munich: Release 51/Oct. 2001 and Rel. 54/2004); Christian Czychowski, "Republik Polen," in *Urheberrecht in Mittel- und Osteuropa*, ed. A.-A. Wandtke, Part I, 62–95; see also the numerous references given by J. A. Badowski, "Kleine Novelle' zum polnischen Urheberrechtsgesetz von 1994," *Gewerblicher Rechtsschutz und Urheberrecht/Internationaler Teil (GRUR Int.)*, no. 4 (2001): 291–303 (see there footnote 2); idem, "Erneute Novellierung und Weiterentwicklung des polnischen Urheberrechts," *GRUR Int.*, no. 4 (2004): 289–301; a German translation of the Polish Law of 4 Feb. 1994 is in *GRUR Int.*, no. 6 (1994): 479–91; for German translations of further amended versions, see *GRUR Int.*, no. 4 (2004): 301–5, as well as A. Dietz, "Part Polen/II" as well "Part Polen/V," in *Quellen des Urheberrechts*.

⁸ See, generally, M. Trampuž, "Das neue Urheberrecht in Slowenien—eine europäische Landschaft stellt sich vor," *GRUR Int.*, no. 10 (1995): 766–82; Ch. Czychowski, "Republik Slowenien," in *Urheberrecht in Mittel- und Osteuropa*, ed. A.-A. Wandtke, Part I, 153–76; German translation of the Slovenian Copyright Law of 30 March 1995, 376 as well as in *GRUR Int.*, no. 10 (1995): 783–802; see also the comparative study by A. Dietz, "Bedeutsame Entwicklung des Urheberrechts im südosteuropäischen Raum—am Beispiel der Reformgesetze Sloweniens, Kroatiens und Serbiens," *GRUR Int.* no. 10 (2006): 809–26 (1st part) and no. 11 (2006): 906–19 (2nd part).

⁹ See G. Faludi and P. Gyertyánfy, "Ungarn," in *Urheberrecht in Mittel- und Osteuropa*, ed. A.-A. Wandtke, Part II, 177–263; G. Hegyi, "Das neue ungarische Urheberrechtsgesetz (Gesetz LXXVI/1999)," *GRUR Int.*, no. 4 (2000): 325–46; "German translation of the Hungarian Law," *GRUR Int.*, no. 12 (1999): 1035–51, as well as in *Urheberrecht in Mittel- und Osteuropa*, ed. A.-A. Wandtke, Part II, 529.

¹⁰ See A. Dietz, "Tschechische Republik," in *Urheberrecht in Mittel- und Osteuropa*, ed. A.-A. Wandtke, Part II, 117–53; idem, "Das neue tschechische Urheberrechtsgesetz—ein europäisches Spitzenprodukt," in *Festschrift für Manfred Rehbinder*, ed. J. Becker et al. (Munich: Beck, 2002), 215–32; I. Telec, "Zum neuen tschechischen Urheberrechtsgesetz vom 7. April 2000. Eine Einführung," *GRUR Int.*, no. 3 (2001): 219–28; German translation of the Czech Copyright Law of 7 April 2000, in *Urheberrecht in Mittel- und Osteuropa*, ed. A.-A. Wandtke, Part II, 414–79 as well as in *GRUR Int.*, no. 10 (2000): 871–981. After the peaceful

In the sense of what is referred to as the five-pillar system of copyright¹¹ many of these laws¹² thus represent a balanced and interrelated system of rules within the following “pillars” or subsystems: 1) substantive copyright law (objects, owners, content in terms of moral and pecuniary rights, duration and limitations of copyright protection); 2) related or neighboring rights, in particular in favor of performers and sound and video producers; 3) copyright contract law (including contract law regarding performers); 4) a comprehensive regulation of collecting societies; and, finally, 5) a comprehensive set of rules on enforcement of copyright.

The Role of the EU Copyright Harmonization Directives

There was one further factor all these countries increasingly had to take into consideration, namely harmonized European copyright law. Today that harmonized EU law is mainly represented by the seven European copyright harmonization directives which gradually came into being between 1991 and 2001; they are complemented by other instruments, in particular the Enforcement Directive of 2004. The latter directive concerns all intellectual property rights and, of course, prominently also copyright law.¹³

Simply by historic accident, the decade between 1991 and 2001 also represented the period when the original versions of most of the new postsocialist copyright laws were adopted. Thus the first of the seven copyright harmonization directives, namely the Computer Program Directive (Directive 91/250/EEC of 14 May 1991), was adopted in 1991, more or less at the beginning of the reform period in the postsocialist countries. Three other relatively early directives followed in 1992 and 1993, namely

dissolution of Czechoslovakia on 1 January 1993, the Slovak Republic and the Czech Republic each adopted separate copyright regulations. The Slovak Republic was first through the Copyright Law of 5 Dec. 1997 (German translation in *GRUR Int.*, no. 12 (1998): 963–73) and later replaced by the current Copyright Law of 4 Dec. 2003 (since further amended).

¹¹ See A. Dietz, “Die fünf Säulen des Urheberrechtssystems und ihre Gefährdungen,” in *Musik hat ihren Wert*, ed. A. Dümling (Regensburg: ConBrio, 2003), 336–47.

¹² For other laws which followed more or less the same model, see the country reports as published in A.-A. Wandtke, ed., *Urheberrecht in Mittel- und Osteuropa*.

¹³ The Enforcement Directive will not further be included in the present short comparative study.

the Rental Right Directive (Directive 92/100/EEC of 19 November 1992), the Satellite and Cable Directive (Directive 93/83/EEC of 27 September 1993) as well as the Period of Protection Directive, known as the Term Directive (Directive 93/98/EEC of 29 October 1993).

The fact that these four directives were adopted early in the decade, at the same time that many individual postsocialist reform laws¹⁴ were also adopted meant that it was inevitable that some or even all of them would have a degree of influence upon the initial phase of legislative reform.

In contrast, the remaining directives (apart from the Database Directive of 1996, which was adopted midway through the process [Directive 96/9/EC of 11 March 1996]), namely the important and comprehensive Information Society or Copyright Directive (Directive 2001/29/EC of 22 May 2001) as well as the Resale Right Directive (Directive 2001/84/EC of 27 September 2001), were not adopted until 2001 when most of the new postsocialist copyright laws had already been adopted, at least in their original versions. Consequently, only later, amended versions of the laws were likely to be influenced by these later directives.

But indeed, many elements taken from the first four directives could already be found, to differing degrees, in the original versions of the post-socialist reform laws; that is true in particular for the very important and utilitarian Computer Program Directive of 14 May 1991. But why did the postsocialist legislators feel obliged to incorporate such elements into their respective reform laws at all?

The Relevance of the Europe Agreements and the Partnership Agreements

It seems, initially, that the Eastern European countries voluntarily incorporated solutions found in Western European models and in the early copyright directives into their new reform laws, following the “best practice” procedures to be found there. But later the process was subject to legal obligations under international or EC treaty law. Depending on the international instruments concerned, such obligations had a different reach and legal force.

¹⁴ See the details given by Dietz, “Trends in the Field of Copyright Law.”

It is important to differentiate between Association Agreements¹⁵ (called Europe Agreements)¹⁶ on the one hand and Partnership and Cooperation Agreements on the other. The primary difference between the two categories of agreements lies in the fact that the Association Agreements are concluded between the European Union and its member states or countries with a clear prospect of later EU membership. Conversely, the Partnership and Cooperation Agreements are not associated expressly with current or future membership, even if the corresponding political will may exist in individual cases.

As a consequence, the first of the two categories of agreements, namely Association Agreements, typically contains the following, rather far-reaching, obligation to legislative conformity, namely “to provide ... for a level of protection similar to that existing in the Community, including comparable means of enforcing”¹⁷ the rights concerned.¹⁸ Such obligation extends, of course, also to copyright.

In contrast to the above agreement, less extensive obligations are contained in the Partnership and Cooperation Agreements concluded with ten further countries,¹⁹ in particular the Russian Federation and Ukraine as well as many other successor states of the former Soviet Union, with the exception of the Baltic countries. The typical formula found in such agreements is as follows: “the Parties confirm the importance they attach to *ensure adequate and effective protection and enforcement of intellectual, industrial and commercial property rights*.”²⁰

¹⁵ Later called “Stabilisation and Association Agreements” when applied to Yugoslav successor states; see, e.g., the Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Croatia, of the other part, dated 29 Oct. 2001, OJ EU L 26 of 28 Jan. 2005, 3.

¹⁶ For details see Silke von Lewinski, “The Role of Copyright in Modern International Trade Law,” *RIDA* no. 161 (July 1994): 5ff., in particular 63ff.

¹⁷ See, e.g., Art 67(1) of the Europe Agreement Establishing an Association between the European Communities and their Member States and Romania of 1 Feb. 1993, OJ EC L357 of 12 Dec. 1994; see also Von Lewinski, “The Role of Copyright,” 68.

¹⁸ See also the slightly different formulation in Art. 71(2) of the Stabilisation and Association Agreement as concluded with Croatia (footnote 15), which reads as follows: “Croatia shall take the necessary measures in order to guarantee no later than three years after entry into force of this Agreement *a level of protection of intellectual, industrial and commercial property rights similar to that existing in the Community*, including effective means of enforcing such rights.”

¹⁹ Armenia, Azerbaijan, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Ukraine, Uzbekistan, and Tajikistan.

²⁰ See, e.g., Art. 54(1) of the Agreement on Partnership and Cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part, of 24 June 1994, OJ EC L 327 of 28 Nov. 1997, 3, 18.

Of course, even in the case of a country bound by a reasonably strict Association Agreement the obligation to provide for a *similar level of protection* does not yet imply an obligation to introduce the full *acquis communautaire*; such a comprehensive obligation to full legislative conformity exists only when, after successful completion of the accession negotiations, an actual Accession Treaty is concluded and has entered into force.²¹

In such cases, a new member country has to have fully implemented the existing copyright *acquis*, in particular the seven copyright directives, by the date of their accession to the European Union. This was the case on 1 May 2004, when the three Baltic states—Estonia, Latvia, and Lithuania—acceded to the European Union as did Poland, the Czech Republic, Slovakia, Slovenia, and Hungary and, again on 1 January 2007, with the accession of Bulgaria and Romania. Croatia became the latest member country on 1 July 2013.²² Other countries, primarily the remaining successor states of the former Yugoslavia, are still in the preaccession phase and thus have no more than candidate status.²³

²¹ See, e.g., Art. 2 of the “Act concerning the conditions of accession of the Republic of Bulgaria and Romania and the adjustments to the treaties on which the European Union is founded,” that act forming an annex and integral part of the treaty concerning the accession of the Republic of Bulgaria and Romania to the European Union, dated 25 April 2005; see OJ EU L 157 of 21 June 2005, 11, and 203, respectively. Art. 2 of that act reads as follows: “From the date of accession, the provisions of the original Treaties and the acts adopted by the institutions and the European Central Bank before accession shall be binding on Bulgaria and Romania and shall apply in those States under the conditions laid down in those Treaties and in this Act.” For a detailed discussion of the approximation of Bulgarian copyright law to the *acquis communautaire*, see A. Dietz, “Bulgarisches Urheberrecht und *acquis communautaire*,” *GRUR Int.*, no. 9 (2004): 699–706; see also A.-A. Wandtke, “Republik Bulgarien,” in *Urheberrecht in Mittel- und Osteuropa*, ed. A.-A. Wandtke, Part I, 40–61; German translation of the Bulgarian Law in *ibid.*, Part I, 191–228. Concerning Romania, see the German translation of the Copyright Law No. 8 of 14 March 1996 in *ibid.*, Part I, 275–332, and in *GRUR Int.*, no. 12 (1997): 988–1004; see, generally, A.-A. Wandtke, “Republik Rumänien,” in *Urheberrecht in Mittel- und Osteuropa*, ed. A.-A. Wandtke, Part I, 96–121; A. Dietz, “Das europäisch harmonisierte rumänische Urheberrecht. Entwicklung und augenblicklicher Stand nach dem EU-Beitritt Rumäniens,” *GRUR Int.*, no. 11 (2009): 883–95.

²² The accession negotiations with Croatia were completed on 30 June 2011; the Accession Treaty was signed on 9 December 2011 in Brussels. Entry into force and accession of Croatia to the EU took place on 1 July 2013. But, according to the “Progress Report” by the EU Commission (The Comprehensive Monitoring Report on Croatia’s State of Preparedness for EU Membership, COM[2012] 601 final), submitted by the EU Commission on 10 Oct. 2012, a number of substantial items still had to be implemented or regulated by Croatia at that time.

²³ Current candidate countries are, in addition to Turkey, Montenegro, and Serbia.

The Practical Effects of the Different Formulae of Legislative Approximation

It is clear that the stricter obligation contained in an Association Agreement, as mentioned above, results in much more detailed incorporation of the provisions described in the harmonization directives than the rather more lenient obligation to ensure “adequate and effective protection” required under a Partnership and Cooperation Agreement. Closer inspection of different types of copyright laws in, for example, the Czech Republic (in the preaccession stage)²⁴ or Russia,²⁵ could show such variations.

The variations of the formulae for achieving a certain degree of legislative conformity, used in both kinds of agreements, did not, however, always lead to correspondingly different results. In some cases this may be a result of the highly technical character of the relevant provisions of some harmonization directives, which often represent a hard fought and finely tuned legal and political compromise.

Alternative solutions invented by the Eastern European countries themselves had the potential to reopen delicate debates in their own societies. There was underlying insecurity about whether their own solutions would ultimately fulfill the obligation of providing “*a similar level of protection*” or ensuring “*adequate and effective protection.*”

A striking example of this not infrequent parallelism of approaches is the manner in which individual Eastern countries have regulated what is known as the resale right, which concerns a particular right of authors in the field of plastic and graphic arts to profit from the commercial resale of such works. It is of course not unexpected for countries bound by Association Agreements (and eventually by Accession Treaties) to fully comply with the provisions of the applicable Resale Right Directive of 2001 (Directive 2001/84/EC) even before accession.

But surprisingly, even the Russian Federation, bound by a more lenient Partnership and Cooperation Agreement, introduced provisions on the resale rights (*pravo sledovaniya*) in 2006. These provisions are heavily

²⁴ See footnote 10.

²⁵ See the following footnote 26. The first postsocialist copyright law of the Russian Federation dated from 9 July 1993; German translation in *GRUR Int.*, no 11 (1993): 853–64.

influenced by the above-mentioned directive, in particular with regards to the tapering (decreasing) scale of percentage rates. Russia abolished its first postsocialist copyright law of 1993, which contained only a rudimentary provision for the resale right, and replaced it with the copyright regulation in Part IV of the new Russian Civil Code;²⁶ the new provisions on the resale right are contained in Article 1293²⁷ of that code.

Another good example of the parallelism of legislative approaches mentioned above is the regulation of the protection of computer programs in various Eastern European countries. As already mentioned, for simple scheduling reasons the first of the seven EU copyright directives, namely the Computer Program Directive of 14 May 1991 (Directive 91/250/EEC), was incorporated by the new copyright laws of the Eastern European countries relatively early on.²⁸

Without entering into the minutiae here,²⁹ it is suffice to say that incorporation was effected similarly by all relevant countries,³⁰ whether or not they had already concluded an association agreement or only a partnership and cooperation agreement or even no agreement at all. This is primarily due to the fact that the Computer Program Directive presented a new and rather technical copyright solution for a keenly felt worldwide problem; it was therefore not necessary, nor indeed advisable, for those

²⁶ See, generally, A. Dietz, "Regulation of Copyright Law in the New Part IV of the Russian Civil Code: An Important, but Partly Problematic Piece of Legislation," *RIDA*, no. 216 (April 2008): 123–82; English translation of the complete Code by W. E. Butler, *The Civil Code of the Russian Federation* (London: Wildy, Simmonds and Hill 2010); see also introduction and German translation of the parts dealing with copyright by A. Dietz, *GRUR Int.*, no. 3 (2009): 205–27.

²⁷ For more details see A. Dietz, "The Resale Right (*pravo sledovaniya*) in Russian Copyright Law," *RIDA*, no. 229 (July 2011): 156–203.

²⁸ I refer here to the original versions of these laws, all of which were later amended.

²⁹ For more details see A. Dietz, "Influence of EU Copyright Harmonization Directives on the Building of Post-Socialist Copyright Law in Eastern Europe," in *Harmonization of European IP Law: From European Rules to Belgian Law and Practice: Contributions in Honour of Frank Gotzen*, ed. M.-C. Janssens and G. van Overwalle (Brussels: Bruylant, 2012), 99ff., 108ff.

³⁰ See, in chronological order, Art. 3 as well as Arts. 70 and 71 of the Bulgarian Copyright Law of 16 June 1993; Art. 7, Paras. 1 and 3, as well as Art. 25 of the Russian Copyright Law of 9 July 1993, which has since been replaced by Part IV of the Russian Civil Code; Art. 1, Para. 2, and Art. 3 as well as Arts. 74ff. of the Polish Copyright Law of 6 Feb. 1994, which, however, contains errors; further Art. 5(2) and Art. 8, Para. 1, as well as Arts. 111ff. of the Slovenian Copyright Law of 30 March 1995; and, finally, Art. 7 as well as Arts. 72 et seq. of the relatively late Romanian Copyright Law of 14 March 1996. For more examples, see Dietz, "Trends in the Field of Copyright Law," 144 and 213 n37 and n38.

countries to search elsewhere for alternatives, which would, perhaps, not have been forthcoming.

This is particularly true for the most intricate provision on permissible decompilation or reverse engineering of a computer program for the purposes of achieving interoperability with other programs. That provision, as contained in Article 6, Paragraphs 1 and 2, of the directive, was incorporated, mostly unchanged, by almost all countries concerned.³¹

Sometimes the postsocialist legislators had difficulty understanding the sophisticated new regime on the protection of computer programs, in particular the provisions on its limitations (exceptions). This is made apparent by the fact that errors were made in some cases in the incorporation of the provisions of that directive. Thus, two important countries, namely Poland and Romania, committed basic errors when implementing the directive;³² but since the errors have since been corrected,³³ there is no need to go into further detail here.

Errors aside, the first step, implementation or incorporation of the Computer Program Directive was successfully completed without significant delay in almost all Eastern European countries whether or not associated countries or “only” partnership countries.

Implementation of the EU Copyright Directives as an Incremental (Step-by-Step) Process: The Romanian Example

It would be impossible to systematically and comprehensively analyze the implementation of all copyright directives in all the Eastern European countries here; therefore, we will briefly analyze as *pars pro toto* the

³¹ See Art. 75, Para. 2, No. 3, and Para. 3 of the Polish Copyright Law; Art. 115, Paras. 1 and 2, of the Slovenian Copyright Law of 30 March 1995 as well as (also with errors as referred to in footnote 31) Arts. 78 and 79 of the Romanian Copyright Law of 14 March 1996. The same is true, apart from some rearrangements of sentences or of fractions of sentences, of Art. 25, Paras. 2 and 3, of the Russian Copyright Law of 9 July 1993; and finally also of Art. 71, Para. 3, of the Bulgarian Copyright Law of 16 June 1993.

³² For details concerning Art. 74 par. 4 No. 1 of the Polish Copyright Law in its original version of 6 Feb. 1994 as well as Art. 78 par. 1 of the Romanian Copyright Law again in its original version of 14 March 1996, see Dietz, A. “Influence of EU copyright harmonization directives,” 109ff.

³³ In Poland by an Amendment of 2000 (see the information given by Dietz, note 7), 16 and in Romania by the Amendment Law No. 285/2004 (see footnote 37).

process of implementation as realized in one specific country, namely in Romania as a late EU member country. The legal basis for the process of implementation initiated by Romania started with the Association (or Europe) Agreement concluded with the EU on 1 February 1993,³⁴ and then the Treaty of its Accession to the EU, dated 25 April 2005.³⁵

The significance of this is that implementation of the whole *acquis communautaire* in the field of copyright was, almost by necessity, an incremental or step-by-step process; indeed, it would be unreasonable to expect that such objectives could be achieved by one overarching, comprehensive act of legislation.

Nevertheless, the Romanian Copyright Law No. 8 of 14 March 1996 (Law No. 8/1996)³⁶ was adopted relatively late; therefore, the original version of the law was already able to reflect the provisions of a number of existing EU harmonization directives. The other, remaining directives were gradually implemented later on by several amendments to the Romanian Copyright Law, primarily by Amendment Law No. 285 of 23 June 2004 (Law No. 285/2004)³⁷ and Amendment Law No. 329 of 14 July 2006 (Law No. 329/2006).³⁸

As far as political aspects are concerned, we should refer to the current Article 151² Romanian Copyright Law as introduced by the Urgency Decree No. 123/2005 and confirmed by the Amendment Law No. 329/2006. The article begins as follows: “The present act implements the provisions of the following normative acts of the Community,” and then all seven of the EU copyright harmonization directives (as well as the Enforcement Directive) are listed. This provision documents the willingness and belief of the Romanian legislators that (as of July 2006) they had fully implemented all those directives.

Whether that rather political compliance statement contained in the Romanian Copyright Law is totally correct, can only be ascertained by

³⁴ OJ EC No. L357 of 31.12.1994, p. 2; see, in particular, its Art. 67.

³⁵ See footnote 21.

³⁶ See footnote 21.

³⁷ Monitorul Oficial (Mon. Of.) no. 287 of 30 June 2004.

³⁸ Mon. Of. No. 657 of 31 July 2006; the Amendment Law No. 329/2006 has been preceded by the Urgency Decree (Ordonanța de urgență) No. 123 of 1 September 2005, which the law confirms in amended form. As to the legal nature of such urgency decrees, see the references given by Dietz, “Das europäisch harmonisierte rumänische Urheberrecht,” 886.

scrupulous comparative analysis of its relevant provisions, an endeavor not, of course, undertaken for the purposes of this chapter.³⁹

However, the proposed gradual implementation of the seven copyright directives was completed to all intents and purposes in 2006. It had taken place by implementing the first four directives, namely the Computer Program Directive, the Rental Right Directive, the Satellite and Cable Directive as well as the Term Directive with the original version of the Copyright Law No. 8/1996 of 14 March 1996.

The next directive, chronologically, was the Database Directive of 11 March 1996 (Directive 96/9/EC), which Romania was not able to fully implement at that early stage. In spite of the fact that the directive of 11 March 1996 had been adopted in Brussels three days before the Romanian Copyright Law of 14 March 1996, the Romanian legislators were obviously not prepared to fully implement it at that time.

Nevertheless, copyright protection of *database works* as a subcategory of “collections of works” (*culegerile de opere*) was expressly provided by Article 8 of the Romanian Copyright Law and was in the original text of the law. Although the *sui generis* right of makers of databases, a peculiar and innovative feature of the Database Directive, was introduced in Romania relatively late, namely by the Amendment Law No. 285/2004.⁴⁰

The same Amendment Law No. 285/2004 also implemented the remaining EU copyright directives, (the Information Society Directive and the Resale Right Directive). This was achieved through the complete reformulation of the provisions concerning authors’ exploitation rights,⁴¹ especially distribution rights and their exhaustion as well as rental and lending rights.

The same is true for the various aspects of the right of public communication (*comunicarea publica*), including the “making available” right (online right), as well as the broadcasting and the cable retransmission rights. Finally, the existing provisions on the resale right in Article 21 of Romanian Copyright Law were made to conform to the provisions of the

³⁹ For some examples of noncompliance, e.g., concerning the applicable law in case of foreign satellite broadcasts or concerning the calculation of the duration of copyright in case of film works, see Dietz, “Das europäisch harmonisierte rumänische Urheberrecht,” 887 and 888 respectively.

⁴⁰ See now Arts. 122¹ to 122⁴ Rom. CL (text of 2006).

⁴¹ See Arts. 12ff. Rom. CL.

Resale Right Directive, which, in part, delivered more favorable terms to authors, for example, setting the minimum relevant sales price at €300.⁴²

At the same time special consideration was also given to procedural aspects and copyright infringement sanctions as well as to the protection of technical measures and of rights management information,⁴³ a particularly important feature of the Information Society Directive.

Finally, a comprehensive overhaul and refinement of many important provisions of the Romanian Copyright Law was affected by Amendment Law No. 329/2006 (preceded by the Urgency Decree No. 123/2005) which, apart from minor additional amendments, represents the current state of Romanian copyright law.⁴⁴

To sum up, I think the Romanian example shows how demanding the implementation of the complete *acquis communautaire* is and what enormous efforts were required by legislators, who, during the same period, also had to implement thousands of other legal acts required by the *acquis*. In addition to that, as in the other former socialist countries, the starting point for copyright legislation was the completely inadequate socialist regulation, which in Romania was based on the Copyright Decree No. 321 of 21 June 1956⁴⁵ until the end of the socialist Romanian state; therefore, what the Romanian legislators have ultimately and rather impressively achieved, certainly as the “law on the books,” is a mature and modern example of copyright law.

Conclusion

A comprehensive and comparative study of the copyright laws in all the Eastern European countries would show that, as in Romania, modern copyright regulations have been achieved, influenced in no small part by the seven EU copyright directives (as well as the Enforcement Directive).

⁴² See Art. 21, Para. 4, Rom. CL as compared to the facultative rule in Art. 3 of the Resale Right Directive.

⁴³ See Arts. 138⁵ and 138⁶ Rom. CL as well as generally, concerning procedure and sanctions, Arts. 138⁷ff. Rom. CL.

⁴⁴ For more details, see Dietz, “Das europäisch harmonisierte rumänische Urheberrecht,” 886ff.

⁴⁵ See, e.g., Y. Eminescu, *Dreptul de autor* (Bucharest: Lumina Lex, 1994).

In addition, the copyright laws of the Eastern European countries tend to be structurally quite consistent and all-inclusive in the sense of the five-pillar model. Unfortunately that is no longer totally true for the new Russian copyright regulations which have become part of the codification of intellectual property within the Russian Civil Code, a concept which has been much criticized in Russia itself. Copyright provisions are now scattered throughout different chapters of the new Part IV of the Civil Code, a rather ineffective legislative technique.⁴⁶

An entirely different issue, however, is enforcement, i.e., “law in action” in contrast to “law on the books.” In this regard many doubts still surround all the countries concerned, albeit to differing degrees. However, this is not the place for an “antipiracy study.” That remains the job of lobbyists and the copyright industry itself, comparative law being primarily occupied with texts.

Of course, harmonization of copyright law in Europe is certainly not complete. The latest step in this process was a new directive on the law of collecting societies.⁴⁷ We can only hope that in the complicated field of activities relating to collecting societies, as well as the numerous other fields of copyright regulation, the European law makers learn from the experiences of the Central and Eastern European countries, as the latter had to learn from them.

⁴⁶ See footnote 26.

⁴⁷ See Directive 2014/26/EU of the European Parliament and of the Council (26 February 2014) on collective management of copyright and related rights and multiterritorial licensing of rights in musical works for online users in the internal market, OJ EU L84 of 20 March 2014, 72.

A New Concept in an Old Context: The Legal Framework of the Transformation of Intellectual Property in Macedonia after the Dissolution of Yugoslavia

MIŠO DOKMANOVIĆ

Introduction

The global system of intellectual property rights (IPR) has undergone profound changes and transformations in the last few decades. A large number of countries in the world, including the countries of Central and Eastern Europe (CEE), have strengthened their IPR regimes. To a large extent, this developing process has been caused by economic globalization. Regional and national markets have become more integrated and, as a result, governments' barriers to the flow of trade and technology have decreased.¹ The information technology revolution played a central role in this process. Furthermore, the political changes in Europe considerably influenced the process by which the intellectual property framework developed.

The fall of the Berlin Wall and the transition to democracy and a market economy ushered in a new stage in the development of intellectual property law in CEE. The countries in the region faced the task of transforming their legal systems to answer the needs of the free market. The socialist planned economy was to be swiftly replaced by a market economy, such that countries were pressured to develop new standards for the protection of intellectual property. Additionally, the prospects for EU membership seemed to play a crucial role in the development of the new legal framework in particular through the approximation and harmonization process.

Furthermore, the region of former Yugoslavia has experienced two decades of political and economic turmoil (with civil war, ongoing political

¹ K. E. Maskus, "The Role of Intellectual Property Rights in Encouraging Foreign Direct Investments and Technology Transfer," *Duke Journal of Comparative and International Law* 9 (1998): 110–11.

instability, the communist legacy in successor countries, property transformation, economic sanctions, ongoing and unsettled disputes). These factors have affected the creation of the new framework for intellectual property protection.

In light of these transformations, this chapter will analyze the development of a legal framework for intellectual property in Macedonia in the 1990s, focusing on key factors and processes that have shaped Macedonian intellectual property legislation, and on developments regarding copyright and neighboring rights as well as industrial property.

Intellectual Property Reinvented? CEE Countries after the Fall of the Berlin Wall

The transition to democracy and the market economy that occurred in Eastern Europe in the beginning of the 1990s demanded an expeditious transformation of the former socialist countries in a number of fields, including their IPR frameworks. An important challenge in this process represented the fact that the countries of Central and Eastern Europe (CEE) had been exposed to different IPR regimes in the twentieth century.

A considerable tradition of IPR protection existed in most CEE countries, including Yugoslavia, in the period before World War II, evidently initiated by the 1886 Berne Convention.² Furthermore, the main feature of this initial concept consisted in the fact that countries in the region adopted the European continental approach of author's rights as opposed to the Anglo-Saxon concept of copyright.³

On the other hand, a unique socialist approach to issues of intellectual property was developed in the early 1950s in the wake of World War II and the changes that occurred in the political systems in most CEE countries.

² As a result, the majority of CEE countries, including Czechoslovakia, Poland, Romania, and Yugoslavia, adopted copyright laws in the 1920s. Although some provisions regarding copyright existed in the 1897 Trade law, Bulgaria adopted its first law on copyright in 1921. See: V. Petrov, "General Overview of the Legal Regulation of Intellectual Property Law in Bulgarian Legislation and Legal Theory," in *Avtorsko pravo i srodni prava—domasna i megunarodna teorija i praktika* (Skopje: Praven fakultet, 2007), 169.

³ S. Lewinski, "Copyright in Central and Eastern Europe: An Intellectual Property Metamorphosis," *Fordham Intellectual Property, Media and Entertainment Law Journal* 8, no. 1 (2000): 41.

For example, copyright was largely restricted in favor of the general public. The rights of performing artists, phonogram producers, and broadcasting organizations were severely restricted during the socialist period. The lack of interest in protection was further affected by the low level of technological innovation, including the use of personal computers. Moreover, regulation of neighboring rights was not addressed in the socialist laws. However, the Yugoslav break with Cominform led to the introduction of elements of market economy there, which influenced the development of the IPR framework.

A completely new view of industrial property emerged in many communist/socialist countries. During communist rule, competition was suppressed, and the idea that innovation represents a comparative advantage was disregarded. In some cases, the right to exploit industrial property belonged solely to the state and not to the company or individual who invented it. For instance, in the Soviet Union all inventions of Soviet citizens were proclaimed state property. This specific approach corresponded to the principles of a socialist planned economy and was maintained until 1991. However, this was not the case in Yugoslavia, where a distinct concept of social property emerged in the 1950s. In Yugoslavia, the right to exploit an invention belonged to the company for a certain duration, while the inventor retained the moral rights.

The fall of the Berlin Wall instantaneously transformed many aspects of the social, political, and legal system. As far as the development of copyright law is concerned, CEE countries generally adopted two main approaches: 1) the adoption of a completely new copyright law (Albania, Bulgaria, Estonia, Macedonia, etc.); and 2) the amendment of existing laws (Hungary and Croatia).

Some countries immediately drafted new intellectual property legislation. In the Baltic countries, this process began at the end of 1991. In Latvia, for example, a bundle of laws were drafted and enacted in a relatively short period from September 1991 to March 1993, which included the Patent Law, the Trademark Law, the Law on Industrial Design Protection, and the Law on Copyright and Neighboring Rights.⁴ The first copyright law

⁴G. Poliakov, "Legal Opportunities for the Protection of Intellectual Property Rights in Latvia," in *Intellectual Property Rights in Central and Eastern Europe: The Creation of Favorable Legal and Market Preconditions*, ed. E. Altvater and K. Prunskiene (Amsterdam: IOS Press, 1999), 110.

in Estonia was passed in December 1992.⁵ This process was clearly influenced by the radical changes in economic relations. The newly introduced market economy demanded a new framework for intellectual property protection. As a result, intellectual property and its two main elements (copyright and neighboring rights) and industrial property were reinvented in CEE countries.

Among the main driving forces behind the drafting of the new legislation were international multilateral and bilateral agreements. In the 1990s CEE countries were quick to sign international treaties and join initiatives in the field of intellectual property rights (such as the Berne Convention for the Protection of Literary and Artistic Works, revised in 1971), the 1971 Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of Their Phonograms, and the Universal Copyright Convention (revised in 1971).⁶ Other European multilateral organizations such as the EFTA and CEFTA foresaw similar provisions in treaties that regulated their relations with CEE partner countries. The process of approving international agreements was further accelerated by the signing of bilateral agreements with the United States, which became extremely popular. These bilateral agreements, especially in the field of copyright, included the regulation of issues such as enforcement and dispute settlement, etc.

Another important role was played by the European Community (EC), which developed a new mechanism by which the laws of CEE countries were to be increasingly aligned in order to lay the ground for potential future membership. The EC developed three types of agreements in the context of the evolution of relations among CEE countries. The first type of agreement was the agreement on trade, commercial, and economic cooperation, which was established from 1988 to 1991. This agreement called for the “adequate protection and enforcement of intellectual property rights” and urged CEE countries to align with international standards.

Given the fact that the first type of agreement created a relatively flexible framework for intellectual property rights enforcement, a second more

⁵ K. Rattus, “The Situation and Development of Intellectual Property in Estonia,” in *Intellectual Property Rights in Central and Eastern Europe*, 117.

⁶ United States Copyright Office, “International Copyright Relations of the United States,” <http://www.copyright.gov/circs/circ38a.pdf>.

comprehensive type of agreement was introduced in 1992. This agreement replaced the formulation of “adequate protection” with “a level similar to what exists in the EC,” which suggested a more precise framework for the development of intellectual property legislation in aspirant countries.

The third type of agreement, known as the “Europe Agreements,” served the sole purpose of preparing the parties of the agreement to become members of the Union. The “Europe agreements” included more precise provisions concerning the level of protection which was expected to be achieved by the aspirants. The provisions included the obligation of aspirants to meet the level of protection that existed in the Union and to accede to specified international conventions within five years. Furthermore, CEE countries were obliged to adapt their intellectual property laws to current and future EC legislation, while complying with EC harmonization directives.⁷ As a result, CEE countries began to join international organizations and to accede to international agreements in the field of intellectual property. The prospect of EU membership was a motivation for many of these countries.

The Development of the Macedonian Intellectual Property Framework

Since it had been part of the former Yugoslavia, Macedonia had a tradition of intellectual property protection. The development of intellectual property law in Macedonia took place in three broad phases: 1) from 1913 to 1945; 2) from 1945 to 1991; and 3) from 1991 to the present day.

Officially, Macedonia was part of the Kingdom of Serbia, the Kingdom of the Serbs, Croats, and Slovenians, and the Kingdom of Yugoslavia⁸ from the end of Balkan wars (1913) until the end of World War II (1945). During this phase, Yugoslav law incorporated European trends in intellectual property protection. The Kingdom of Serbia was therefore one of the first signatories of the 1883 Paris convention on industrial property, which was later succeeded by the Kingdom of Yugoslavia. This undoubtedly

⁷ S. Lewinski, “Copyright in Central and Eastern Europe,” 46–48.

⁸ The Kingdom of Serbs, Croats, and Slovenians was established in 1918 and renamed as the Kingdom of Yugoslavia in 1929.

influenced the development of legislation in this country, such that industrial property rights were regulated by the 1920 King's Act on Industrial Property Protection⁹ and the 1922 Law on Industrial Property Protection.¹⁰ It should be emphasized that industrial property regulation was developed under the direct influence of Austrian and German law, and it addressed the issues of patents, trademarks, and industrial design. Furthermore, in the absence of relevant cases, the courts adopted practices applied in Austrian and German courts.¹¹

In light of the provisions of the Paris Convention, which called for the establishment of an institution for industrial property protection, the first Administration for the Protection of Industrial Property in Yugoslavia was set up in 1920 by the aforementioned King's Act. This institution changed its name several times, and has been called the Federal Administration for Invention (1948), the Federal Patent Bureau (1953), the Federal Patent Administration (1956), the Patent Administration (1958), and the Federal Patent Office (1967), etc. Since its foundation, the Federal Patent Office has dealt with patents, trademarks, industrial models and samples (designs) and, since 1981, with stipulations of geographical origin. Other part of intellectual property such as copyright and neighboring rights were addressed in the first law on copyright, adopted in 1929, followed by the Law on the Prevention of Unfair Competition of 1930.

As mentioned above, a completely new approach to the field of intellectual property rights emerged during the socialist period. Copyright and industrial property restriction in favor of the general public also existed in socialist Yugoslavia. However, since Yugoslavia broke away from the Communist Bloc in 1948 and introduced elements of the market economy, this country was one of the few countries that provided a certain degree of protection of neighboring rights. Macedonia enjoyed the status of a federal unit and separate republic of Yugoslavia from 1945 to 1991.

It should be emphasized that a number of laws focusing on copyright protection were adopted on the federal level during the socialist period.

⁹ Official Gazette 265, 27 November 1920.

¹⁰ As a result of the changes and revision of the Paris Convention and the Madrid Agreement, the Law on Industrial Property Protection was amended in 1928.

¹¹ J. Dabovic and V. Pepeljugovski, *Pravo na intelektualna sopstvenost* (Skopje: Praven fakultet, 2008), 56.

A new law on copyright was adopted almost every decade, namely in 1946, 1957, 1968, and 1978. The 1978 law on copyright remained in force for five years after Macedonia's declaration of independence in 1991. Several supplementary laws were adopted from 1945 to 1991 in the field of industrial property protection. In 1948, the law on inventions and technical improvements was passed. The adoption of the 1960 law on patents and technical improvements marked the beginning of a new phase in the development of industrial property protection.¹² Moreover, the law on marks for goods and services and the law on models and designs entered into force in 1961. These laws included provisions regarding the content, disposing and the lapse of the right, and regarding procedures with which the right should be applied, examined, registered, cancelled, restored to its original status, and represented or given judicial protection.¹³

Another important piece of legislation, the law on the protection of inventions, technical improvements, and signs of distinction was passed in 1981. Although this law represented an attempt to modernize the legal framework for industrial property protection, investors showed signs of fatigue, resulting in a decrease of the number of domestic applications. This law was further changed and amended early in 1990 in order to make it possible to ratify international conventions and to transform existing socialist self-management¹⁴ terminology.¹⁵ Consequently, the law underwent "nomotechnical"¹⁶ improvements, including a new concept of protection, in particular the protection of patents, while changes to the application procedure extended the rights of applicants and improved

¹² In the previous law the patent was foreseen as an instrument for the protection of the rights of foreign inventors. Following the transformation to self-management and the 1954 central state arbitration decision, the patent issue applied in practice to domestic inventors as well. The 1960 law on patents and technical improvements was the first law to include this right.

¹³ Dabovic and Pepeljgovski, *Pravo na intelektualna sopstvenost*, 57.

¹⁴ Self-management was introduced in the Yugoslav economy in the early 1950s. The concept foresaw the creation of worker's councils in the socially owned companies, composed of all the employees who were in charge of the company's management.

¹⁵ For instance, the term "organizations of associated labor" was amended with "i.e. companies" (Art. 1) and the chapter on the "Self-management regulation of the right to use inventions created through associated labor" (Art. 27) was completely erased from the text of the law (*Zakon za izmeni i dopolnuvanja na zakonot za zastita na pronajdoci, tehnicki unapreduvanja i znaci za razlikuvanje*, *Sluzben vesnik*, no. 3/90).

¹⁶ The term "nomotechnique" refers to professional rules and principles on the legislative technique that stipulate the way provision, especially law, should be written.

judicial protection. One of the main reasons for these changes to the law was the authorities' wish to create the necessary legal framework in which relevant international conventions could be ratified and implemented.

The first law against unfair competition and monopoly agreements was passed in socialist Yugoslavia in 1974.¹⁷ This law regulated competition and its two main components, namely unfair competition and monopoly agreements.¹⁸ The fact that Yugoslavia was a rare case among Eastern European countries to adopt such a regulation was, to a large extent, the result of the radical economic reforms carried out from 1965 to 1970, which focused on strengthening the market economy sector. In 1990, the issue of unfair competition was included in the new law on trade,¹⁹ which effectively supplanted the law against unfair competition and monopoly agreements, which thereafter was no longer in force. In other words, the legislator accepted the incorporation of provisions on unfair competition into the law on trade and the suspension of the previous solution, which provided for a special separate law. This approach is often perceived to have been a step backward in the development of unfair competition legislation, and has therefore been criticized by a number of scholars.²⁰

Furthermore, strong court practice in the field of intellectual property law existed in Yugoslavia during the socialist period. Both national and federal courts dealt with cases related to intellectual property. For instance, in a decision dated 20 October 1983, the Supreme Court of Macedonia declared that public buses are public places, such that copyright would be infringed in cases when the company operating the buses did not pay a fee for playing music via built-in radios in the bus.²¹ In 1986, the same court decided that an author of photography was not entitled to an additional

¹⁷ This law was later amended in 1986 and 1989 (*Sluzben vesnik*, no. 24/74, 72/86 and 58/89).

¹⁸ The law has defined unfair competition as "any action of the organizations of associated labor for trade purposes which are contrary to good business relations and which cause or might cause damage to other organizations representing associated labor, consumers or the social community." The law foresaw eighteen actions which were considered as unfair competition, including unfair advertising, trade libel, etc. It should be emphasized that the law has incorporated the general clause defining unfair competition, which was further implemented in the subsequent laws of Yugoslavia and Macedonia.

¹⁹ *Zakon za trgovijata* (*Sluzben list na SFRJ*, no. 46/1990).

²⁰ V. Pepeljovski, *Pravo na konkurencija—Antimonopolsko pravo* (Skopje: FON, 2009), 173.

²¹ *Odluka na Vrhovniot sud na Makedonija* (*Rev.*, no. 224/83, 20 October 1983).

fee if his or her photograph was filmed in a documentary advertizing a museum exhibition.²² In all instances, the courts in other Yugoslav republics and in the federal courts developed elaborate practices dealing with copyright cases. Although court practice is not a direct source of law in Macedonia, court decisions, including cases related to intellectual property law, are regularly published by relevant institutions. As a consequence, court decisions often serve as guidelines for judges dealing with new cases and when further developing legislation.

The dissolution of Yugoslavia in the 1990s marked the beginning of a new phase in the development of intellectual property legislation in Macedonia, which had since become an independent state. The declaration of independence in 1991 marked the beginning of the third phase of the development of intellectual property law in the country. Besides the dissolution of Yugoslavia and the transition to democracy and a market economy, several other factors have influenced the overall process.

An important factor in the drafting of the new legislation was the information and communication technology revolution of the 1990s. Personal computers, photocopying machines and recording equipment became publicly accessible and dramatically transformed the concept of intellectual property. Moreover, the traditional notion of copyright and neighboring rights was affected by the digitalization process. The prospect of becoming a member of multilateral organizations such as the European Union also affected the development of Macedonian intellectual property legislation.

The 1991 Constitution of the Republic of Macedonia provided the basic framework for intellectual property legislation. Article 47 of the constitution guaranteed the freedom of scholarly, artistic and other forms of creative work as well as rights derived from creative work. Furthermore, Article 55 of the constitution guaranteed the freedom of the market and entrepreneurship. Measures are also being taken to provide legislation ensuring that all parties enjoy an equal legal position in the market and that monopolistic positions and monopolistic conduct on the market may be restricted.

²² Odluka na Vrhovniot sud na Makedonija (Gz., no. 16/86, 4 June 1986).

The interregnum between the adoption of the new constitution and the drafting of the new laws in line with it was resolved by Article 4 of the Constitutional Law for the Implementation of the Constitution, which declared that “the existing federal legislation will be accepted as national under the jurisdiction of the bodies foreseen in the Constitution of the Republic of Macedonia.”²³

As a result, the old federal laws regarding intellectual property were applied in the first years of Macedonian independence. However, given the fact that the laws were outdated and did not reflect the latest European trends in intellectual property protection, Macedonian authorities made an effort to change the legislation. Several new laws were adopted, including the Law on Industrial Property (1993, 2002), the Law on Trade (1995, 2004),²⁴ the Law on Copyright and Neighboring Rights (1996), and the Law against Unfair Competition (1999).²⁵ Some aspects of copyright are regulated in other laws such as the Law on Culture,²⁶ the Law on the Use of the Macedonian Language,²⁷ the Law on the Protection of Cultural Heritage,²⁸ and the Law on Compulsory Specimens.²⁹ The existing Law on Industrial Property was adopted in 2009.³⁰ Furthermore, the current Law on Copyright and Neighboring Rights was passed in 2010.³¹

The Ministry of Development assumed the jurisdiction of industrial property³² in April 1992. The first industrial property law of independent Macedonia was adopted in July 1993, such that Macedonia became a member of the World Intellectual Property Organization in the same year. The State Office of Industrial Property was established in the end

²³ Ustav na Republika Makedonija (*Sluzben vesnik na SFRJ*, no. 52/1991).

²⁴ Zakon za trgovija (*Sluzben vesnik na RM*, no. 16/04, 128/06, 63/07, 88/08, 159/08, 20/09, 99/09, 105/09, 115/10, 158/10, 36/11, 53/11).

²⁵ Zakon protiv nelojalnata konkurencija (*Sluzben vesnik na RM*, no. 80/99).

²⁶ Zakon za kulturata (*Sluzben vesnik na RM*, no. 31/98, 49/03, 82/05, 24/07, 116/10, 47/11, 51/11).

²⁷ Zakon za upotreba na makedonskiot jazik (*Sluzben vesnik na RM*, no. 05/98, 63/99, 89/08, 116/10).

²⁸ Zakon za zastita na kulturnoto nasledstvo (*Sluzben vesnik na RM*, no. 20/04, 115/07, 18/11, 148/11).

²⁹ Zakon za zadolžitelen primerok (*Sluzben vesnik na RM*, no. 11/94, 92/08, 47/11).

³⁰ Zakon za industriska spostvenost (*Sluzben vesnik na RM*, no. 21/09, 24/11).

³¹ Zakon za avtorsko pravo i srodnite prava (*Sluzben vesnik na RM*, no. 115/10, 51/11).

³² According to tradition, there was a separate ministry/secretariat within the federal unit governments which dealt with the issues of development. This tradition continued in the postsocialist governments of Macedonia until the end of the 1990s.

of 1993, which adopted several additional documents, regulations, and strategies for intellectual property development. These documents effectively implemented international and European standards for industrial property.

Macedonia acceded to the Universal Copyright Convention in 1997, the Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of Their Phonograms in 1998, the World Intellectual Property Organization (WIPO) Copyright Treaty in 2004, and the WIPO Performances and Phonogram Treaty in 2005. The emergence of music piracy in the 1990s here and in other Eastern European countries meant that protection of this field of copyright was given priority. Furthermore, the implementation of international conventions within national legislation involved the factor of time. Other fields of law also challenged the authorities and affected the overall IPR framework during the first decade after Macedonia gained independence.

A number of EU directives have been incorporated into domestic legislation concerning intellectual property rights over the last ten years, including Directive 91/250/EEC on the legal protection of computer programs, Directive 92/100/EEC and its successor Directive 2006/115/EC on rental right and lending right and on certain rights related to copyright in the field of intellectual property, Directive 92/100/EEC and its successor Directive 2006/116/EC on the term of protection of copyright and certain related rights, Directive 96/9/EC on the legal protection of databases, Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society, Directive 2001/84/EEC on the right of resale for the benefit of the author of an original work of art, Directive 2004/48/EC on the enforcement of intellectual property rights. Western law clearly influenced the drafting of both copyright and industrial property laws here. Domestic legislation on copyright largely followed the European continental system.

This overview of Macedonian intellectual property legislation demonstrates that it has adopted international standards. It is clear that the main task in the legislative process after independence was to implement the developing international standards in different areas of intellectual property, and to make them compatible with the existing legal order in the country. The legislation has been approved by foreign experts, although

the issue of its implementation still represents a challenge. Progress with implementation is being assessed in the context of the EU approximation and harmonization process, which I will present in the next part of this chapter. However, it seems that one of the key challenges to the implementation and enforcement of legislation was posed by social factors. During the transition period the social situation in the country deteriorated as unemployment and poverty dramatically increased. In the new circumstances, a new sector of gray economy emerged. The existence of the gray economy was upheld largely by the infringement of copyrights. Hence the enforcement of IPRs depended on the overall social situation and on political decisions taken in order to cope with the issue.

In the current Macedonian Law on Copyright and Neighboring Rights the copyright work has been defined as “intellectual and individual work in the field of literature, science and art, expressed in any form or shape.” The copyright work covers written works, computer programs, spoken and musical works, drama, audiovisual works and so on. For quite some time now and under the strong influence of the EC directives, computer programs and databases have become subject of legal protection, including the EC Directive 91/250 EEC on the legal protection of computer programs,³³ and bilateral agreements reached by CEE countries with the US, which were signed in the early 1990s.

The provision of Article 17 (1), that the author is a natural person who has created a copyrighted work, is consistent in most EU member states.³⁴ Furthermore, Macedonian law defines copyright as an integral and inseparable right which includes moral and economic rights. As a result, one might conclude that Macedonian law adheres to monistic theory.³⁵

Article 21 of the law recognizes far-reaching moral rights which include the recognition of authorship, the right to disclose a work for the first time,

³³ European Union, “Directive 91/250/EC on the Legal Protection of Computer Programs,” <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31991L0250:EN:HTML>.

³⁴ Zakon za avtorsko pravo i srodne prava (*Sluzben vesnik na RM*, no. 115/10, 51/11).

³⁵ The Constitution of the Republic of Macedonia guarantees the freedom of scholarly, artistic, and other forms of creative work (Article 47). However, there is no notion of moral and material rights in the constitution as in the case of, for instance, the Constitution of the Republic of Croatia. Article 69 of the Croatian constitution also guarantees the protection of moral and material rights deriving from scientific, cultural, artistic, intellectual and other creative efforts.

the right to protect the integrity of a work, and the right to renounce a work. The rights of reproduction, distribution and public performance and transmission and the right to alter a work have been foreseen as economic rights in the law. Moreover, the law incorporated a number of statutory rights covering remuneration.

Like Directive 2006/116/EC,³⁶ the terms of protection were set at seventy years following the death of the author. Sound recordings and broadcasts are subject to neighboring rights which, according to EU directives, are protected for fifty years following the day of the performance.

One of the main features of this law is the incorporation of provisions concerning contracts in the field of copyright law. Contract rules have been added to cover specific aspects of copyright exploration, including a publishing contract (Article 75), a public performance contract (Article 82), a contract for orders of authors' work (Article 85) and a copyright created in the course of employment (Article 86).

Finally, as in other CEE countries, one of the challenging pieces of legislation was the regulation of collecting societies. Practice has shown that the collecting societies tend to monopolize and/or misuse their position.³⁷ The current law created a comprehensive procedure for granting the status of the collecting society. According to Article 132, the license is granted by the Ministry of Culture, which also oversees the supervision of their work.

As far as industrial property rights are concerned, Macedonia became a member of the European Patent Organization in 2009. The latest law on industrial property established the framework for the implementation of the European Patent Convention. The body authorized to implement and enforce the Industrial Property Protection Law is the State Office of Industrial Property.

³⁶ European Union, "Directive 2006/116/EC on the Term of Protection of Copyright and Certain Related Rights," http://europa.eu/legislation_summaries/internal_market/businesses/intellectual_property/l26032_en.htm.

³⁷ For instance, in 2012 a dispute broke out between the collecting societies, the Musical Copyright Society of Macedonia (ZAMP) and the Macedonia Musical Industry (MMI) about their jurisdiction. Furthermore, early in 2013, as a result of the MMI tariffs, three national television broadcasters threatened to stop broadcasting Macedonian music on their stations.

The Role of EU Approximation and the Harmonization Process

Since its declaration of independence, Macedonia has affirmed its aim of joining Euro-Atlantic organizations including the EU. As a result of the existing outstanding differences between Macedonia and Greece concerning the name of the country, diplomatic relations with the EU were set up only in 1995. Immediately after the establishment of diplomatic relations, the EU initiated negotiations leading toward signing an agreement on wide-ranging cooperation in the fields of trade, financial operations, and transport.³⁸

Macedonia was the first country in the Western Balkans to sign the Stabilization and Association Agreement in April 2001. As a result of the conclusions of the EU Thessaloniki summit,³⁹ Macedonia applied for EU membership in March 2004. Following the positive response of the European Commission, the Council decided to grant Macedonia candidate status in December 2005. The opening of membership negotiations was recommended in October 2009. However, the unresolved issue concerning the country's name, and the resulting dispute with Greece, has thwarted the beginning of the accession negotiations. Since the process has not commenced despite a lapse of three years, the Commission has launched a high-level accession dialogue instrument to fill the interregnum that was created.

As in the case of other EU aspirants, the granting of candidate status in 2005 made it necessary to conduct a series of annual reports on the country's progress toward meeting political and economic criteria for membership. Furthermore, Article 68 of the Stabilization and Association Agreement with Macedonia has underlined the importance of aligning existing and future laws, and emphasized the need to gradually make its laws compatible with those of the Community. The provisions in Article 68 have created the framework for the harmonization of the Macedonian legislation with the *acquis*. This framework required and still requires a long list of changes as well as the modification of national legislation.

³⁸ The diplomatic relations with the EU were established on 22 December 1995 as a result of the signing of the Interim Agreement between Greece and Macedonia. See http://untreaty.un.org/units/120001_144071/6/3/00004456.pdf.

³⁹ The EU Thessaloniki summit, held in June 2003, reaffirmed the prospects of the Western Balkan countries to acquire membership of the Union.

Changes made to certain laws often led to negative reactions within the population. On a number of occasions, protests were organized against the activities of the authorities to prevent the infringement of copyright at public markets. However, since receiving the EU candidate status, the lawmakers have given higher priority to EU requirements than to national practices or requests from civil society.

Article 71 shows that both parties acknowledged the importance of ensuring adequate and effective protection and enforcing intellectual, industrial and commercial property rights. Macedonia accepted the obligation to protect these rights over a period of five years after the adoption of the agreement, which included the accession to multilateral conventions on intellectual, industrial, and commercial property rights.⁴⁰

The reports review and assess annually, chapter by chapter, the country's capacity to assume the obligations of membership, that is, the *acquis* expressed in the treaties, in secondary legislation, and in the policy of the Union. Such progress reports helped to accelerate reforms and harmonize intellectual property law in Macedonia.

In the early stages of the annual reporting process, Macedonia demonstrated a number of weaknesses with respect to the provision of intellectual property protection. These weaknesses ranged from meeting international standards in domestic legislation to law enforcement and awareness raising.

One of the most challenging EU reports in terms of intellectual property implementation in Macedonia was published in 2006. The 2006 progress report acknowledged the adoption of the new Law on Copyright and Neighboring Rights and changes and amendments to the Industrial Property Law. Moreover, the report acknowledged efforts made to improve the administrative capacity (a special department for copyright and neighboring rights was established at the Ministry of Culture, and the number of employees at the State Office for Industrial Property was increased). However, according to the EU, the lack of any initiative to enforce intellectual property rights remained a serious challenge. The report criticized the lack of official reliable statistics concerning the enforcement of IPRs and the neglect of making an example of pirates through the seizure and

⁴⁰ European Union, "Stabilization and Association Agreement between the European Communities and their Member States Macedonia," http://ec.europa.eu/enlargement/pdf/the_former_yugoslav_republic_of_macedonia/aa03_01_en.pdf.

destruction of equipment used to make pirated goods. Given the fact that the Stabilization and Association Agreement established that, by June 2006, the measures required to guarantee the protection of intellectual, industrial and commercial property rights on a level similar to that provided in other EU countries had not been taken, the report concluded that Macedonia did not comply with the Stabilization and Association Agreement.⁴¹

The negative remarks contained in the 2006 Progress Report on Macedonia meant that further changes were to be made to the legislation. In 2007 and 2008, several laws, including the Criminal Code,⁴² the Industrial Property Law,⁴³ and the Law on Copyright and Neighboring Rights⁴⁴ were changed and amended. Moreover, further efforts were made to enforce the legislation. The number of employees at relevant state bodies was increased, border control by the customs administration was improved, and further activities designed to reinforce the capacity of enforcement bodies were introduced.

Consequently, the enforcement record began to improve from 2008, following an increase in the number of cases prosecuted by the court. In 2008, a total of 406 court procedures for misdemeanors were initiated. However, this number was still unsatisfactory. As mentioned above, the overall social situation in the country had a considerable impact on the observance of IPRs. Given the fact that there was no evidence of economic improvement, the violation of copyright remained a source of income for the population, in particular via the illegal sale and renting of pirated materials.

In 2010, the number of misdemeanors as well as civil and criminal proceedings increased: 152 cases were registered in the courts, leading to 34 fines of between €200 and €1,600 imposed on legal entities and the imprisonment of ten individuals. Furthermore, a special Coordination Body for Intellectual Property was established within the State Office of

⁴¹ European Commission, "2006 Macedonia Progress Report," http://ec.europa.eu/enlargement/pdf/key_documents/2006/nov/fyrom_sec_1387_en.pdf.

⁴² The changes of the criminal code included new types of breaches of copyright and increased fines.

⁴³ The changes of law were an attempt to further harmonize with the *acquis*.

⁴⁴ The copyright law was amended in order to transfer responsibility for inspection from the Ministry of Culture to the State Market Inspectorate (SMI) and to increase fines for breach of copyright.

Industrial Property, which seized approximately 130,000 counterfeit products and ten outlets in 2009.

In order to improve the implementation and enforcement of these laws, the state authorities and bodies began to prepare relevant documents. A National Strategy and Action Plan designed to expand capabilities to implement and enforce the *acquis* in the area of copyright, neighboring rights and industrial property rights was adopted in 2009. Furthermore, the State Office for Industrial Property signed the 2010–12 Action Plan with the European Patent Organization. The National Program on Culture (2004–8) placed emphasis on the protection of copyright and neighboring rights, and some institutions began to publish monthly reports concerning their activities in intellectual property protection.

For the purpose of this research, we also analyzed other international reports regarding the level of intellectual property protection. According to the BSA Global Software Policy Study of 2011, Macedonia did not improve the control of piracy. Although the piracy rate decreased from 68 percent in 2007 to 66 percent in 2011, which is above the average piracy rate of CEE countries,⁴⁵ the commercial value of unlicensed software increased from US\$11 million in 2007 to US\$22 million in 2011.⁴⁶

However, the protection of intellectual property rights clearly improved. According to the International Property Right Index⁴⁷ for 2012, the rate of intellectual property protection increased from 4.7 in 2007 to 5.7 in 2012. However, Macedonia was ranked as 14th out of 24 countries in Central and Eastern Europe and Central Asia, and 87th out of 130 analyzed countries in the world.⁴⁸ This data suggests that the country needs to further strengthen the implementation and enforcement of intellectual property rights.

⁴⁵ According to the BSA Global Policy Study, the average piracy rate of CEE countries in 2011 was estimated to be 62 percent.

⁴⁶ Business Software Alliance, "Shadow Market: 2011 BSA Global Software Piracy Study," 9th ed., (2012), 8, http://portal.bsa.org/globalpiracy2011/downloads/study_pdf/2011_BSA_Piracy-Study-Standard.pdf.

⁴⁷ The International Property Right Index is comprised of ten variables: judicial independence, rule of law, political stability, control of corruption, protection of physical property rights, the registering of property, access to loans, protection of intellectual property rights, patent protection, and copyright piracy.

⁴⁸ Property Rights Alliance, *2012 Report International Property Rights Index*, 85, http://oi.org.mk/upload/ATR_INDEX_mar20.pdf.

As we already have pointed out, the role of the EU approximation and harmonization process speeded up the drafting and implementation of Macedonian intellectual property law, such that a number of laws were transformed in order to meet international standards. Besides that, a large number of international treaties, which affected domestic legislation, were ratified in line with the Stabilization and Association Agreement with the EU. The country clearly strove to improve IPRs protection in order to implement the integration process with the aim of starting negotiations with the Union. In short, the overall process is often perceived to follow a carrot-and-stick approach.

The case of Macedonia is not unique. Other CEE countries which became EU members over the last decade went through the same process of approximation and harmonization. Slovenia, another country that used to be a member of former Yugoslavia, experienced similar challenges. Following its declaration of independence, Slovenia took steps to address the emerging issue of intellectual property protection. This country anticipated the same setbacks as Macedonia, that is, the need to develop new legislation in line with international standards regarding domestic legal order, the lack of general public awareness, the need for expertise on IP matters in enforcement bodies, as well as the coordination of enforcement bodies. The first postsocialist Law on Copyright and Neighboring Rights was adopted in 1995, followed by a number of activities designed to implement and enforce the legislation. This process was influenced by prospects of integrating the country into the EU, the EU alignment of national legislation, and membership negotiations.

The Slovenian approach was very successful and was soon followed by first results. The comprehensive and complex approach of the Slovenian authorities led to a series of important steps over a period of time. For example, the software piracy rate decreased from 96 percent in 1995 to 48 percent in 2006.⁴⁹ According to BSA, the software piracy rate in 2011 was 46 percent.⁵⁰ Although the Slovenian software piracy rate surpasses rates accepted in the EU, the former gap has shrunk considerably.

⁴⁹M. Trampuž, "Enforcement of Copyright in EU and Slovenia," in *Avtorsko pravo i srodni prava—domasna i megunarodna teorija i praktika* (Skopje: Praven fakultet, 2007), 295.

⁵⁰Business Software Alliance, *2011 BSA Global Software Piracy Study* (2012), 8, http://portal.bsa.org/globalpiracy2011/downloads/study_pdf/2011_BSA_Piracy_Study-Standard.pdf.

Conclusions

Macedonia, once a federal republic in Yugoslavia and now an independent country, has developed a considerable tradition of intellectual property legislation in the twentieth century. The period following the dissolution of Yugoslavia marked a new beginning in this area of law.

We may conclude, therefore, that international and European standards played a central role in addressing the issues of intellectual property protection in the country and the region. A number of new laws and related documents have been passed. The new concept was designed under strong foreign influence, a concept that was expected to respond to the emerging needs of the transformed society. Consequently, the prospect of EU membership stimulated the improvement of intellectual property legislation. At the same time, IPR international regulations challenged domestic legislation and established practices. The new laws sometimes met with strong opposition among certain sectors of the population. The fact that the mentality and economic status of the population did not change strongly affected the process of IPR implementation and enforcement.

Although the legislation meets international standards in the field of intellectual property, its implementation and enforcement has been challenged by the legacy of the previous system. Although the administrative capacity considerably expanded in the last decade, enforcement has been sluggish. EU progress reports emphasize a high level of piracy, a lack of awareness among holders and the general public, a lack of expertise in courts and in customs, police and other law-enforcement bodies and agencies. They also draw attention to the fact that there is no central institution for the coordination of activities among enforcement agencies and bodies, a lack of methodology for gathering statistical data, and that the country's infrastructure is still inadequate.

However, significant progress has been made in the last decade. It should not be forgotten that this process requires patient and persistent enforcement implementation and may not be solved overnight. The Slovenian success story could serve as a best practice example.

Finally, recent development concerning the prospects of EU membership, in particular the extension of accession negotiations, could constrain

the development of the legal framework of intellectual property in this crucial period. The fact that the start of negotiations was postponed in 2009 as a result of the bilateral name dispute with Greece could potentially jeopardize the progress in this area. The current absence of a clear roadmap for the negotiation of EU accession might lead to fatigue among the Macedonian authorities in charge of intellectual property protection.

Opposing the Expansion of Copyright Law: Social Norms in the Quest against ACTA and the “Commodification of Knowledge and Culture Project”*

KATARZYNA GRACZ**

Introduction

This contribution will tackle the question of the expansion of intellectual property in modern Europe from the perspective of copyright law. More precisely, it will focus on a case study of the recent rejection of the ACTA treaty both by the member states and by the European Union as a result of demonstrations of public discontent across Europe, triggered by street protests in Poland.

The author claims that the expansion of copyright law in the recent years has taken the form of what she calls the “Commodification of Knowledge and Culture Project,” which involves the worldwide imposition of the common-law (in particular, the American common-law) vision of copyright as a legal tool which serves to protect the private property of right holders, and where copyright regulations are generally perceived to be a trade-related legal instrument. The author argues that this perception of knowledge and culture goods as mere commodities is not universal,¹

*The draft of this chapter, entitled “Bridging the Gaps between the Social and Legal Norms Concerning Protection of Intellectual and Artistic Creations: On the Crisis of Copyright Law in the Digital Era,” won an essay prize, awarded by the International Association for the Advancement of Teaching and Research in Intellectual Property in January 2013. In recognition of this award the essay was published in *Journal of World Intellectual Property* 16, no. 1–2 (2013): 39–57.

**The defense of my doctoral thesis, entitled “‘You Wouldn’t Steal a Car’ vs. ‘Information Wants to Be Free’: Regulatory Failure of Copyright Law through the Prism of Systems Theory,” is scheduled for 2016. I would like to thank my supervisor, Prof. Giovanni Sartor, for reading the drafts of this article. I would also like to express my gratitude to the organizers and participants of the conference “Intellectual Property in Modern Europe—Tracing the Expansion of a Concept,” in Leipzig, especially Augusta Dimou and Cindy Daase, for giving me the opportunity to participate in this exchange of thoughts, where this contribution was presented, for their endless patience and the helpful advice and comments they offered. I would also like to

hence legal regulations implemented to impose it trigger opposition, either as a result of the empowerment of users in the wake of global technological development, or as a result of local particularities arising from various forms of political, social, or economic historical experience.

The author suggests that we should treat the outburst of public discontent toward the ACTA treaty as a sign of growing conflict between social norms upheld by end users and the paradigm of private property protection in contemporary international intellectual property law. The technological empowerment and clash of copyright law with social norms has resulted in a power shift; it involves the rise of the new lobbies in copyright regulation which reflect the authority of end users. The discontent of the social movements opposing the current copyright paradigm should therefore no longer be underestimated, for social movements might in future become a new constituent power in the legislation of the international intellectual property regime.²

The second part of this chapter was inspired by evolutionary institutional theory which holds that, contrary to the current trend of globalizing legal regulations, social norms guiding human behavior toward law develop gradually in response to local social, economic and historical conditions. It will focus on the analysis of a Polish case study which shows that the historical experience of a given nation might influence the way it perceives justice with respect to the access to knowledge and culture. In the Polish case, the development of norms in favor of open access to knowledge and culture goods might explain why Poles were more inclined than other nations to oppose the ACTA treaty, which is an example of the expanding “Commodification of Knowledge and Culture Project.”

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¹ See, e.g., Roberto Garza Barbosa, “The Philosophical Approaches to Intellectual Property and Legal Transplants: The Mexican Supreme Court and NAFTA Article 1705,” *Houston Journal of International Law* 31, no. 3 (June 2009): 515–64; Neil Netanel, “Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation,” *Rutgers Law Journal* 24, no. 2 (1993): 442.

² See Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge: Cambridge University Press, 2003); U. Mattei and S. Bailey, “Social Movements as Constituent Power: The Italian Struggle for the Commons,” *Indiana Journal of Global Legal Studies* 20, no. 2 (2013): 965–95.

Methodology and Description of the Analyzed Model

This study traces the interplay between the legal system and the following elements: social norms, technology³ and collective interests⁴ of four groups representing the most important actors in the copyright regime.

The legal system is understood here in terms of the systems theory developed by Niklas Luhmann⁵ and Gunther Teubner,⁶ that is, as an autonomous, self-referential normative system that is separate from other normative systems (i.e., religion, morality, social norms), and which independently defines its own boundaries in the process of *autopoietic* operations according to the bilateral code *legal* vs. *illegal*. However, in this study, the concept of self-referential social systems only serves as a metaphor to define dependencies that gave rise to the observed shortcomings of copyright law. Hence systems theory will not be used to make a universal ontological claim about the nature of law, but to explain a given historical pattern of development of copyright law in the postmodern era. In other words, systems theory explains the evolution of copyright law and how it led to the discrepancy between social and legal norms. Nevertheless, I do not think that this discrepancy is inevitable and stems from the nature of law; rather, the divergence between the norms stemming from these two normative bodies must be overcome if copyright law is to be applied in the digital environment.

³Technology is approached in this chapter in a broad sense, as defined by the American sociologist Read Bain, who in the 1930s wrote that “technology includes all tools, machines, utensils, weapons, instruments, housing, clothing, communicating and transporting devices and the skills by which we produce and use them.” See Read Bain, “Technology and State Government,” *American Sociological Review* 2, no. 6 (1937): 860.

⁴Collective interests cover four groups: the collective interests of 1) authors/creators, 2) the end users, 3) intermediaries between authors and the public, and 4) state authorities. The interests are described as *collective* because they are perceived to be shared by representatives of the respective groups, and not specifically relevant to some individuals (e.g., creators’ interests are those that are perceived to be common to all or most creators in a particular territory and historical period).

⁵Niklas Luhmann, *Law as a Social System* (Oxford: Oxford University Press, 2008).

⁶Gunther Teubner, ed., *Autopoietic Law: A New Approach to Law and Society* (Berlin: W. de Gruyter, 1988).

Social norms⁷ are interpreted here as normative statements⁸ that identify social expectations that arise in the course of repeated interactions.⁹ They are enforced either by applying internal sanctions of the *ego*, which emerge as a result of the internalization of norms,¹⁰ and/or by applying external, informal (i.e., nonlegal) social sanctions.¹¹ Social norms might, but do not necessarily have to, coincide with legal norms. Even if they do coincide, they belong to diverse normative systems.

The Distancing Islands of Law and Social Norms: A Universal Perspective

The Expansion of the Strong Proprietary Paradigm in Copyright Law: The Evolution of the “Commodification of Knowledge and Culture Project”

The unbalanced expansion of the strong proprietary paradigm in copyright law is the main cause of the discrepancy between legal regulations and social norms upheld by end users with regard to access to knowledge and culture. However, it was not the introduction of the proprietary paradigm itself (which took place at the very inception of the copyright regime), but rather the degeneration of this paradigm that has tended to treat intellectual property as an absolute and unlimited right as new technologies have emerged. To prove this, this chapter will focus on three historical phases that are perceived as landmarks in the development of mechanisms underlying the current crisis of copyright law.¹² It will show

⁷ For a general review of sociological theories dealing with the concept of “social norms,” see, e.g., Christine Horne, “Sociological Perspectives on the Emergence of Social Norms,” in *Social Norms*, ed. M. Hechter and K.-D. Opp (New York: Russell Sage Foundation, 2005), 3–34.

⁸ See, e.g., George C. Homans, *Social Behavior: Its Elementary Forms* (New York: Harcourt Brace, 1961), 12.

⁹ See, e.g., Dennis Wrong, *The Problem of Order: What Unites and Divides a Society* (New York: Free Press, 1994), 48; Christina Bicchieri, “Learning to Cooperate,” in *The Dynamics of Norms*, ed. C. Bicchieri, J. Richard and B. Skyrms (New York: Cambridge University Press, 1997), 25–27.

¹⁰ For a discussion of the internalization of social norms see, e.g., Emile Durkheim, *The Elementary Forms of the Religious Life* (New York: Free Press, 1915), 236–45; idem, *Suicide* (New York: Free Press, 1951).

¹¹ See, e.g., Talcott Parsons, *The Social System* (New York: Free Press, 1952), 38; Emile Durkheim, “The Determination of Moral Facts,” in *Sociology and Philosophy* (London: Cohen and West, 1953 [1903]), 36, 43.

¹² Within the scope of this model, this analysis does not attempt to reconstruct the entire history of copyright law, but focuses on three important phases that could be regarded as landmarks

not only how the legal system operates, but also expose the mechanisms underlying the complex relations between the legal system and its environment that led to the present shortcomings of copyright protection.

The Advent of Print and the Birth of Copyright Law: The Introduction of the Proprietary Paradigm

Proprietary logic was applied for the first time in the context of intellectual creations as a reaction to challenges arising from the discovery of print, long before modern copyright law was born. The introduction of this new technology had a twofold effect on the interests of intermediaries in the book market. On the one hand, it facilitated fast and (for the first time in history) mass reproduction of books at low cost as people were replaced by machines. The advent of print therefore expanded the interests of middlemen, who could potentially increase their profits by copying on a mass scale and reaching a higher number of potential clients. However, the new technology entailed new commercial risks because potential gains could be easily stolen by unfair competitors who, equipped with appropriate machines, could reproduce the same material without having incurred the transaction costs of the first stage of the publishing process, that is, costs stemming from preliminary interaction between publishers and authors.

Nonetheless, luckily for publishers in Europe at that time their interests converged with the interests of governments and the church, which, in the effort to protect their own affairs, introduced legal regulations that as a by-product created a monopoly for the publishers' services and strengthened their position on the market. This was the case in most European countries in that period, as states and the church in the wish to prevent the dissemination of undesirable and critical content, introduced controls over printing, requiring printers to obtain licenses for producing books.¹³ This regulation system did not amount to modern copyright law, as it

in its development, i.e., 1) the advent of print and of copyright law, 2) the introduction of technologies allowing mass consumer copying, and 3) the advent of digital technologies and the Internet.

¹³ These licenses gave printers an exclusive right to print particular works over a fixed period and enabled them to prevent others from printing the same books during that period. The licenses usually also prohibited the import of the same works printed abroad. See Hector L. MacQueen, Charlotte Waelde and Graeme T. Laurie, *Contemporary Intellectual Property: Law and Policy* (Oxford: Oxford University Press, 2007), 34.

had different goals and took a completely different form, yet it could be seen as the first attempt to regulate the market for intellectual creations. It was under this regime, long before the introduction of modern copyright law, that proprietary logic gradually entered the discourse concerning the nature of intellectual and artistic works.

The proprietary paradigm most likely appeared in discourse concerning intellectual creations for the first time in England around 1590,¹⁴ when members of the Stationers' Company, associating publishers, modified the language used to register printed books.¹⁵ Although this modified rhetoric did not immediately enter public debates, publishers' perception of their rights, which ushered in the paradigm of property in intellectual creations, did change.

When lobbying for the legal protection of their commercial interests, English publishers later used the rhetoric of absolute property as a natural right.¹⁶ Nevertheless, the Statute of Anne¹⁷ of 1709, which was the first instantiation of modern copyright law, was a very moderate and balanced response to the absolute property postulates of publishers. The statute introduced the concept of author's rights, as opposed to publisher's rights. And by minimizing protection to a period of fourteen years, it asserted that copyright law should be distinguished from property rights and treated more as a privilege granted by the state.¹⁸

¹⁴ See Lyman Ray Patterson, *Copyright in Historical Perspective* (Nashville: Vanderbilt University Press, 1968), 54.

¹⁵ Lyman Ray Patterson proves that the form of the entry "evolved from that of a license to print, to the *ownership* of copy, to the *ownership* of a book" (emphasis added). Notwithstanding the fact that the change "was one of form only, not substance," the legal basis for and the legal nature of the copyright remained the same, "the evolution in the form of entry indicates that a subtle conceptual change was occurring and that booksellers had begun to think more explicitly of their '*copies*' or '*books*' as *private property*" (emphasis added), as perceptively noticed by Mark Rose, *Authors and Owners. The Invention of Copyright* (Cambridge, Mass.: Harvard University Press, 1993).

¹⁶ Initially the publishers referred to the property paradigm to justify only their own interests, but later strengthened their position by also applying proprietary rhetoric to creators' rights.

¹⁷ A Bill for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors, or Purchasers of Such Copies, during the Times Therein Mentioned 1709, 8 Anne c. 19 (CJ 16: 369). (See also p. 79 in this volume.)

¹⁸ Symptomatic of this depropriatization of the protection of intellectual and artistic creations is the fact that the initial title of the act was changed from "A Bill for the Encouragement of Learning and for Securing the Property of Copies of Books to the Rightful Owners Thereof" to "A Bill for the Encouragement of Learning by Vesting the Copies of Printed Books in the

By resisting the proprietary rhetoric, the legislator in fact limited the monopoly of the publishers in order to maintain a balance between the interests of the creators, end users and intermediaries in the market of knowledge and artistic goods. More importantly, however, the Stationers' postulates provoked public debates about the nature of *literary property* in England.

A similar situation arose in France, where national debate about the nature of literary property began in 1761 "when a privilege was awarded to the heirs of an author rather than to the author's assignee."¹⁹ In 1777 an initial response to the *absolute property* claims was provided by means of reforming privileges,²⁰ which constituted the first attempt to limit *literary property*, by restricting the rights of publishers in relation to the rights of authors and by expressly recognizing the importance of the public domain insofar as it serves the general interest of society. This discourse evolved further in a similar vein after the French Revolution.²¹ The essence of the French debate about the nature of literary property at that time is best illustrated with a quotation from Le Chapelier's report to the National Assembly concerning copyright law, in which he stated that "a published work is by nature a public property"²² and continued by explaining that "author's rights are recognized by positive law as an exception to this principle, in order to compensate an author for his work."²³

Notwithstanding the initial response to the claims of absolute property, which expressed belief in the need to balance private and public interests, the introduction of modern copyright legislation in England and France

Authors, or Purchasers, of Such Copies, During the Times Therein Mentioned." See Rose, *Authors and Owners*, 46.

¹⁹ Tylert T. Ochoa, "Copyright Duration: Theories and Practice," in *Intellectual Property and Information Wealth: Issues and Practices in the Digital Age*, ed. Peter Yu (Westport: Praeger, 2007), 141.

²⁰ The reform assured that the author who obtained a privilege and did not transfer or sell it, would enjoy an exclusive right in perpetuity to publish and sell copies of his books, which would be inheritable after his death. However, according to the new legislation, if this privilege was obtained by a publisher, the exclusive right would expire after a specified period, giving anyone the right to apply for a *simple permission* to print or sell copies of the work. Ibid.

²¹ Ochoa, *Copyright Duration: Theories and Practice*, 142.

²² Report of Le Chapelier, *Le Moniteur Universel*, vol. 7, 15 January 1797.

²³ Ochoa, *Copyright Duration*, 142; Jane Ginsburg, "A Tale of Two Copyrights: Literary Property in Revolutionary France and America," *Tulane Law Review* 64, no. 5 (1990): 1007.

should be perceived as the beginning rather than the end of the debate about the *proprietary* paradigm in copyright law. The fact that other Western European countries soon followed suit, providing space for public debates about the nature of *literary* and *intellectual property*, proves that this is the case.

The Introduction of Technologies Permitting Mass Consumer Copying: Initial Attempts to Strengthen the Proprietary Paradigm

Although publishers had to contend with technological novelty which challenged the protection of their financial interests as early as the sixteenth century, and consequently employed strong proprietary rhetoric to assert absolute control over the use of protected works, this power was never granted to right holders by law.

The copyright regulations never protected against consumption by individuals. The idea of a private use perceived as being outside the right holders' monopoly exploitation, thus not requiring the prior authorization of rights, was so obvious and accepted by most early European copyright scholars that the initial copyright acts did not even contain provisions protecting private use.²⁴ They appeared only at the beginning of the twentieth century.²⁵

Nevertheless the copyright holders²⁶ resorted to absolute property rhetoric every time they felt that their interests were being endangered by the influence of new technology. The inventions of photocopying and analogue recording equipment in the twentieth century had the same double-edged effect on the commercial interests of middlemen in the market for intellectual and artistic goods as the invention of print had centuries earlier. This time, however, new inventions enabled *consumers* rather than professional competitors to copy knowledge and artistic goods

²⁴ See P. Bernt Hugenholtz, Lucie Guibault, and Sjoerd van Geffen, "The Future of Levies in a Digital Environment," Institute for Information Law, Amsterdam, March 2003, 10, <http://www.ivir.nl/publicaties/download/332>.

²⁵ Exemptions for the reproduction of a work in a limited number of copies, for the purpose of private practice, study or use of the person making the copies, appeared for the first time in early-nineteenth-century versions of Dutch and German copyright statutes. A provision concerning private use in French law was introduced as late as 1957. See *ibid.*, 10.

²⁶ Recourse to *absolute property rhetoric* was mainly taken by middlemen in the market for intellectual and artistic creations, not by authors themselves.

on a massive scale. This once again triggered absolute property rhetoric on the part of the right holders who laid claim to absolute control over the use of protected works with the aim of precluding private copying with the use of new technologies. Following the logic of these strong proprietary arguments, both private individuals who made reproductions with the use of new technologies and manufacturers and retailers of the necessary equipment effectively infringed the owner's copyright.²⁷

In order to protect against such a reasoning the copyright levy system was introduced in Germany as a consequence of two decisions made by the German Federal Supreme Court in 1955 (the *Grundig Reporter* case)²⁸ and in 1964 (the *Personalausweise* case),²⁹ which subsequently spread throughout the rest of continental Europe. The reasons for introducing levy systems in combination with earlier private copying exceptions in Europe were to balance the rights of users and right holders as required by the three-step test outlined in the Berne Convention, which established conditions for any limitations of the reproduction right.³⁰

In sum, the legal system once again managed to balance the diverse social needs expressed via signals stemming from the environment in which the law operates while not succumbing to the absolute property rights postulated by right holders. The levy system introduced into most European countries made it possible to provide equitable remuneration to creators while maintaining copyright regulations in line with social norms that favored private copying.

²⁷ G. Gentz, "Überspielungsfreiheit zum persönlichen Gebrauch?," *GRUR* 11 (1952): 495, quoted in Hugenholtz et al., "The Future of Levies," 10.

²⁸ BGH, 24 June 1955- Aktz.: I ZR 88/54 (Mikrokopien), in *GRUR* 11 (1955).

²⁹ BGH, 29 May 1964—Aktz.: Ib ZR 4/63 in *GRUR* 02/1965. The limits to right holders' control over copyrighted goods were stated even more strongly in the later UK case *Amstrad Consumer Electronics plc v. The British Phonograph Industry Ltd* (1986), in which the court stated that the power of the right holders is also limited by the protection of technological development. However, neither the right to private copying nor the levy system exist in the UK.

³⁰ Jörg Reinbothe, "Private Copying, Levies and DRMs against the Background of the EU Copyright Frameworks," paper presented at the DRM Levies Conference, 8 September 2003, <http://www.aepo-artis.org/usr/docs%20drms/speech%20Reinbothe-private%20copying-levies%20and%20DRM.pdf>.

The Digital Era: Absolute Property

A further technological revolution marked by the introduction of Internet and peer-to-peer technologies forced the legal system to again face absolute property demands by copyright holders. These new technologies facilitated not only mass reproduction but also the mass distribution of copyrighted material. The absolute property campaign therefore resurfaced, and this time successfully changed the face of copyright law by introducing DRM technologies³¹ alongside legal restrictions and a legal ban on circumventing encryptions, prolonging the terms of protection and enforcing the tendency to transfer copyright regulations from the realm of private to the realm of criminal law.

Potential competitors were no longer the biggest challenge to the protection of copyright holders' interests. The content industry undermined practices of individual users on the grounds that they endangered their legitimate interests. Once again, the intermediaries attempted to enforce the paradigm of absolute property, and thereby destroyed the delicate balance that had long been sustained by copyright law, which safeguarded the interests of both right holders and the public. The result was a conflict between the legal and social norms that regulate the production and dissemination of intellectual and artistic creations.

At this time, the international lawmaking process was shifted from the "highly specialized and technocratic corner of international law with few connections to other issue areas,"³² i.e., the World Intellectual Property Organization—(the UN Agenda specializing in intellectual property law) to the World Trade Organization, whose mission is "aimed at reducing obstacles to international trade."³³ The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) has not only "dramatically

³¹ Digital Rights Management technologies constitute a class of access control technologies used by hardware manufacturers, publishers, copyright holders and individuals with the aim of limiting the use of digital content and devices after sale. DRM refers to any technology that inhibits uses of digital content that are not desired or intended by the content provider. See "Digital Rights Management," Wikipedia, http://en.wikipedia.org/wiki/Digital_rights_management.

³² Laurence R. Helfer, "Regime Shifting in the International Intellectual Property System," *Perspectives on Politics* 7, no. 1 (2009): 39–44.

³³ See "Overview," World Trade Organization Web site, http://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm.

expanded intellectual property protection standards”³⁴ worldwide, but has for the first time introduced intellectual property regulations into the international trading system, which laid the foundations of the “Commodification of Knowledge and Culture Project.” The controversial ACTA treaty, which is dealt with in the second part of this chapter constituted the next step in the process by which copyright law was shifted from the regime of culture and intellectual creations to that of trade.³⁵

The Technological Revolution: The Contradictory Expectations of End Users and Copyright Holders

New technologies affected not only legal regulations, but also the social norms according to which end users lived and worked. The technological revolution brought about by the use of computers made both artistic creation and access to the works of others available to everyone on an unprecedented scale. What was once merely a possibility turned into a need and a necessity. Previously unknown technological potentialities caused end users to change their attitude toward what should be legally allowed, and led to an increase in the number of people calling for unlimited access to knowledge and culture on the assumption that technological and legal possibilities should be equated.

However, the same technological changes that led end users to articulate their postulates of freedom of information and culture were used by copyright holders to reinforce the legal protection of their rights. End

³⁴ Helfer, “Regime Shifting in the International Intellectual Property System.”

³⁵ After the ratification of the TRIPS agreement, advocates of introducing strong intellectual property protection as a part of the international trade system (mainly in the US, Japan, and EU) realized that they still faced the problem of the poor implementation and enforcement of IPRs, even in the countries that had ratified TRIPS. Since then, they applied various strategies designed to further reinforce their IP policies beyond the scope of TRIPS. These strategies took one of two forms: 1) bilateral agreements, so-called TRIPS-plus, which introduced higher levels of protection and enforcement; 2) negotiations of the potential multilateral treaty that was to follow TRIPS, with the aim of strengthening the implementation and enforcement of laws. The ACTA treaty, which is analyzed in the second part of this chapter, emerged from the second of these strategies. Although negotiated outside of the WTO, it is another instance of an international treaty that treats intellectual property regulation as an instrument of trade policy and, consequently, knowledge, and cultural goods as mere commodities.

users, who expected greater access, encountered even more protection following the proliferation of “secondary” remedies,³⁶ such as technical measures used to block copyrighted material against the legitimate acts of consumers and the introduction of legal regulations to protect these technical measures from being circumvented.³⁷

In the eyes of consumers, this exorbitant protection of copyright holders’ commercial interests was introduced at the expense of the public’s needs and initially damaged the image of copyright law. For this reinforcement of copyrights not only counteracted the expectations arising with new technologies (that facilitated cumulative research and creativity on a previously unknown scale), but also conflicted with entrenched social norms that favored private use, which almost disappeared under the influence of new technological and legal shields introduced by copyright holders.

It is at this time that public discourse about copyright law drastically changed. Before the Internet revolution, according to Ysolde Gendreau, “copyright law was perceived, even by those in the legal profession, as an arcane and highly specialized area of the law. Its status as an intellectual property right that pertains to the arts helped to cultivate an aura of exclusivity around it. Few people studied it: few courses on it were offered in law schools. Today, the situation has changed radically.”³⁸ Nowadays copyright law is one of the most widely discussed legal issues in public debate around the world, and is even taken up by laymen. “This heightened visibility,” however, as Gendreau emphasizes, “has not translated itself into a greater degree of popularity. On the contrary, copyright law has an image problem.”³⁹

This negative image compounded the expectations of end users that arose with the technological revolution. Moreover, the unbalanced proprietary paradigm in copyright law developed at the expense of public interest and gave rise to a discrepancy between legal regulations and social norms upheld by end users with regard to access to knowledge and culture.

³⁶ Ysolde Gendreau, “The Image of Copyright,” *European Intellectual Property Review* 28, no. 4 (2006), 210.

³⁷ Requirements for anticircumvention laws were globalized in 1996 on the occasion of the creation of the WIPO Copyright Treaty.

³⁸ Gendreau, “The Image of Copyright.”

³⁹ *Ibid.*

The following section will be devoted to the description of the reactions of end users who experienced tension between *what they perceive to be fair* in terms of the copyright protection and *what the law permits*.

The Response of the Environment: End Users' Reactions to the Discrepancy between Social and Legal Norms

There are two main bodies of scholarship that describe the options available when faced with burdensome law.⁴⁰ The compliance literature⁴¹ suggests that groups will try to *avoid* laws that they find too costly to comply with. The political choice literature,⁴² on the other hand, suggests that groups in such situations tend to *change* the law. Both bodies of scholarship analyze various cases in which the law may become burdensome. By applying this model, I will show that the conflict between social norms upheld by end users and legal norms is the main cause of the high costs of compliance. I will then introduce the concept of *political salience* in order to demonstrate a further dimension of the dynamics between *strategies of avoidance* and *change*.

⁴⁰ This part of the analysis was inspired by the article written by Tim Wu, "When Code Is Not Law," *Virginia Law Review* 89 (2003): 101–70.

⁴¹ See, e.g., Tom R. Tyler, *Why People Obey the Law* (New Haven: Yale University Press, 1990); Leo Katz, *Ill-Gotten Gains: Evasion, Blackmail, Fraud, and Kindred Puzzles of the Law* (Chicago: University of Chicago Press, 1996); Ronald Turner, "Reactions of the Regulated: A Federal Labor Law Example," *Labour Law* 17, no. 479 (2002), 479–93; Eric A. Posner, "Law and Social Norms: The Case of Tax Compliance," *Virginia Law Review* 86 (2000), 1781–1819; E. Allan Lind and Tom R. Tyler, *The Social Psychology of Procedural Justice* (New York: Plenum Press, 1988); Eric A. Posner, *Law and Social Norms* (Cambridge, MA: Harvard University Press, 2000).

⁴² Dennis C. Mueller, *Public Choice II* (Cambridge: Cambridge University Press, 1989); Sam Peltzman, "Toward a More General Theory of Regulation," *Journal of Law & Economics* 19 (1976): 211–40; George J. Stigler, "The Theory of Economic Regulation," *Bell Journal of Economics & Management Science* 3, no. 2 (1971): 3–21; William M. Landes and Richard A. Posner, "The Independent Judiciary in an Interest-Group Perspective," *Journal of Law & Economics* 18 (1975): 875–901; Iain McLean, *Public Choice: An Introduction* (Oxford: Basil Blackwell, 1990); William M. Landes and Richard A. Posner, *The Political Economy of Intellectual Property Law* (Washington, DC: AEI-Brookings Joint Center for Regulatory Studies, 2004); José Casas Pardo and Pedro Schwartz, eds., *Public Choice and the Challenges of Democracy* (Cheltenham: Edward Elgar, 2007).

The Model of Compliance and the Strategy of Avoidance

The model of compliance may be most simply explained as a statement according to which *laws are followed when the expected costs of legal punishment exceed the expected benefits of the banned behavior*.⁴³ There are, however, two sets of external factors that contribute toward compliance with law: 1) social norms and 2) investments in mechanisms to avoid sanctions.⁴⁴ These two sets of factors that influence compliance with law are interdependent and should therefore be taken into consideration in conjunction. The conflict between social norms and legal regulations may, for example, initially lead to people's disinclination to comply,⁴⁵ which develops further when mechanisms to avoid sanctions are available. In other words, if social norms clash with legal regulations, groups may avoid complying with the law while trying to avoid sanctions. The reverse situation is also plausible when the availability of mechanisms enabling people to avoid sanctions leads to change in social norms and thereby reduces rates of compliance. If a very serious clash between social and legal norms arises, the regulated agents may shun compliance and stop avoiding sanctions, proving that they want to be punished to demonstrate the injustice of law. This is how civil disobedience or revolutionary movements are born.

According to the compliance literature, mechanisms facilitating the avoidance of problematic legal regulations may take two forms: *evasion*, understood as an effort to decrease the odds of being punished for violating a law⁴⁶; or *avoidance*, which can be defined as an effort to exploit differences between the law's goals and its self-defined limits.⁴⁷ End users' strategies of file sharing, which lead to the avoidance of copyright

⁴³ See, e.g., Richard A. Posner, *Economic Analysis of Law*, 5th ed. (New York: Aspen Law & Business, 1998), 242, where the author states that "[t]he model can be very simple: A person commits a crime because the expected benefits of the crime to him exceed the expected costs."

⁴⁴ In his article "When Code Is Not Law," Wu suggests that the influence of social norms on compliance has already been a topic of a profound research, whereas the mechanisms of avoidance have been neglected.

⁴⁵ The most basic models of compliance acknowledge the power of social norms to encourage compliance with law, however, the reverse process of the discouraging effect in the situation of conflict between law and legal norms should not be undervalued.

⁴⁶ See Wu, "When Code is not Law," 112–16.

⁴⁷ *Ibid.*

regulations, in fact adopt both forms. The former is exemplified by the application of various types of software which ensure anonymity in the network; and the latter is instantiated by sharing platforms that create the illusion that file sharers are close friends, such that they are protected by private copying provisions.

Both types of *avoidance strategy* involve individual action, but do not involve cooperation between the subjects of the law who are dissatisfied with its functioning. The *avoidance strategy* is therefore perfectly suited to large unorganized groups of end users. By contrast, the *strategy of change* is not suited to large unorganized groups of end users, as the following section will demonstrate.

The Model of Political Choice and the Strategy of Change

The literature on political choice has distinguished between two major types of strategies to change the law that the regulated groups find burdensome, that is, *litigation* and *lobbying*. The former strategy is probably more effective in common law systems, where the law is modified on the basis of cases decided by judges, and is best exemplified by strategic litigations. Both instantiations of the *strategy of change*, however, differ from the *avoidance strategy* insofar as they require collective action on the part of the dissatisfied regulated groups in order to effectively modify legal regulations. Therefore, small, well-organized interest groups may more effectively change the law than large, unorganized groups. Hence, when the benefits of law are concentrated and its costs diffuse, a small, well-focused interest group will usually succeed in obtaining the benefit of the law even if it does not benefit society as a whole.⁴⁸

In compliance with these theoretical assumptions, including those that may be applied to the case of copyright law, the *strategy of change* has been so far confined to right holders, who are largely represented by intermediaries in the market for knowledge and artistic goods or collecting societies. The large unorganized group of end users resorted to *strategies of avoidance* described above, for *the strategy of change* was burdensome, involving collective action problems that were difficult to overcome by large or loose groups. The very nature of the *strategy of change* therefore

⁴⁸ James Q. Wilson, *Political Organizations* (New York: Basic Books, 1973).

makes it more readily available to well-organized interest groups rather than to the general public, which can rather resort to *avoidance strategies*.

The following section will introduce another dimension to the model in which mutual interactions between the regulator, the regulated and the law are analyzed: the *political salience* of the regulated domain. It will show that *political salience* is yet another factor which favors well-organized interest groups of copyright holders over the general public when it comes to influencing lawmaking in the field of copyright law.

Political Salience and Its Influence on Strategies of Change

Political scientists use the concept of *political salience* to refer to the importance of a political issue to an average voter, relative to other issues.⁴⁹ The issues of *high political salience* are ones that are considered to be important by the general public, topics on which public discussions focus and which serve as the basis for formulating electoral programs. Nevertheless many issues in capitalist democracies are not subject to general vote,⁵⁰ either because the nature of these issues is too complicated for the general public to formulate an opinion on or because they are perceived to be irrelevant by the “*median voter*.”⁵¹ Issues of *high political salience* win elections, whereas those of *low political salience* have no significant influence in the political race between parties. Issues of *low political salience* are absent from mainstream media, and therefore provide no incentive to politicians to gain expertise in them. Nonetheless, even though *issues of low political salience* do not form part of public political discussions, they sometimes become crucially important to organized interest groups. The lack of public interest and resulting lack of media coverage and in-depth knowledge about the issue among politicians “create an ideal political terrain for interest groups with a concentrated interest in the outcome of the political process.”⁵² These groups do not need to resort to elections in order to realize their interests. In most cases they apply *quiet politics*⁵³

⁴⁹ Ken Kollman, *Outside Lobbying: Public Opinion and Interest Group Strategies* (Princeton: Princeton University Press, 1998), 9.

⁵⁰ Pepper D. Culpepper, *Quiet Politics and Business Power: Corporate Control in Europe and Japan* (New York: Cambridge University Press, 2011), 5.

⁵¹ *Ibid.*, 4–5.

⁵² *Ibid.*, 5.

⁵³ *Ibid.*

in which they use soft methods of convincing politicians to protect their interests during meetings and negotiations about which the general public learns nothing. Consequently, due to negligence decision-makers often lack sufficient expertise to challenge interest groups and are thus vulnerable to the persuasive strategies of business representatives.⁵⁴ Moreover, when a given topic does not proliferate in public discussions, civil society neglects to advance counterarguments, which as a rule force politicians to consider diverse standpoints.

The situation changes however, once the general public pays attention to a particular issue, such that a matter of *low political salience* turns into one of *high political salience*. General public and mass media coverage are interdependent; both of those factors increase the interest of the decision-makers. If voters care about an issue, politicians will pay attention to it and try to win public support. Nevertheless, if public opinion is to counterbalance the power of interest groups, voters must retain their interest in the issue. *Temporary political salience* does not motivate journalists and politicians to develop their expertise, especially when the issue is complicated.⁵⁵

In sum, the *low political salience* of a particular issue enhances the *strategy of change*, and gives well-organized interest groups an advantage over the general public. The history of the development of copyright law once again proves the theories developed by political scientists; it not only confirms the dynamics of the *strategy of avoidance* vs. the *strategy of change*, but also the way in which the dimension of *political salience* favors copyright holders against end users.⁵⁶

Power Shift?

According to the argumentation presented above, the *low salience* of copyright law, which until recently has been absent from public discourse, meant that the general public had little influence over the regulation of access to knowledge and culture. Instead, copyright law has

⁵⁴ Ibid.

⁵⁵ Ibid., 10.

⁵⁶ Angela Daly and Benjamin Farrand, "Scarlet v. SABAM: Evidence of an Emerging Backlash against Corporate Copyrights Lobbies in Europe?," in *Cultures of Copyright*, ed. Dànienne Nicole DeVoss and Martine Courant Rife (New York: Peter Lang, 2014), 26–40.

been controlled by the holders of rights and specialized lawyers, at a time when end users who are dissatisfied with the law were unable to apply the *strategy of change*.

Nevertheless, the digital revolution has changed the situation. First, nowadays anyone may be subject to copyright regulations, either as a creator or as an end user, who acquires access to or distributes the works of others, which effectively turns copyright regulations into an issue of *high political salience*.

Second, thanks to Internet communication, in particular social networking and online petition services, difficulties associated with the process of supplying public good in the form of modifications of the existing law may be surmounted, and thus the strategy of change of the onerous regulations becomes available to the general public. As exemplified by the phenomenon of the Pirate parties and the influence of the recent anti-ACTA protests in Europe, the digital revolution has facilitated the birth of new lobbying power over copyright regulation—the power of end users.

As the following analysis will show, the *political salience* of an issue differs from one society to another, and may be conditioned by specific historical experiences. Hence copyright issues probably have a higher *political salience* in Poland than in Western states, which therefore motivates Poles more than citizens of Western states to resort to *strategies of change* of the onerous law, and which could help to bring about compromise between the conflicting interests in the digital environment.

The Polish Perception of Justice with Regards to Access to Knowledge and Culture: Why Did the Anti-ACTA Protests Start in Poland?

In this part of the chapter evolutionary institutional theory will be applied to describe another source of discrepancy between the current copyright regime and social norms: the fact that social norms, contrary to the global intellectual property regime, are not universal, but have evolved under the influence of local factors such as national culture, particular socioeconomic conditions of jurisdiction, and historical contrasts between legal regulations in force in different territories. The second subsection of this part of the chapter will show, on the basis of the Polish case study, how

particular local developments led to the evolution of social norms that contrast sharply with the *absolute proprietary* paradigm in force in the current intellectual property regime, and which led to extremely intensive anti-ACTA protests in Poland. Before that, however, the first subsection will provide an introduction to evolutionary institutional theory.

Concise Introduction to Evolutionary Institutional Theory

This part of the chapter has been inspired by the book *The Evolution of Modern States: Sweden, Japan, and the United States*, in which Sven Steinmo claims that social systems are complex phenomena that differ fundamentally from inanimate matter and react like living organisms insofar as they change, adapt, and evolve in response to changing reality.⁵⁷ A social system is often the result of a unique series of particular unguided interactions on the micro-level. Since this interaction is the key aspect of an emergent system, similar factors can have very different effects in different contexts.⁵⁸ Most importantly, however, evolutionary institutional theory “takes history seriously meaning that *when* and *where* something occurs can fundamentally shape what occurs.”⁵⁹

By highlighting the uniqueness of the evolutionary patterns of respective social institutions in various countries, evolutionary institutional theory suggests that there are no *global standards* that are equally useful in diverse conditions.⁶⁰ Law, like the economy, must develop in conformity with the particularities of the local environment in order to be effective and respond adequately to social needs.

Evolutionary institutional theory helps us to describe the development of particular social norms in a given society that evolved in contrast to the universal legal regulations in the field of copyright law. The application of evolutionary institutional theory to the analysis of the historical development of copyright law demonstrates that intellectual and artistic creation is one of the innermost spheres of social reality. Therefore, attitudes toward the protection of the fruits of human ingeniousness depend

⁵⁷ Sven Steinmo, *The Evolution of Modern States: Sweden, Japan, and the United States* (New York: Cambridge University Press, 2010), 10–13.

⁵⁸ Ibid.

⁵⁹ Ibid., 13. Emphasis in original.

⁶⁰ Ibid., esp. 1–30.

on manifold circumstances, the most influential of which are historical, cultural, religious, and socioeconomic determinants. Hence, the current trend toward international universal regulations, providing “one size fits all” solutions in the realm of intellectual property law, must be deemed ineffective and inappropriate for the needs of complex social reality.

The Evolutionary Institutional Analysis of Polish Social Norms with Regards to the Distribution of Copyrighted Materials

In January 2012, protests took place throughout Europe, on the streets and on the Internet, in opposition to the ratification of the ACTA agreement. The anti-ACTA movement started in Poland, where the protests also lasted the longest. It is estimated that 100,000 people demonstrated in dozens of cities and smaller towns in Poland to show their objection to the ratification of the controversial treaty.⁶¹ They stayed on the streets for several weeks in spite of harsh weather conditions with temperatures as low as minus twenty degrees. The protests had practical consequences in Poland, because they not only changed the initial position of the government with regards to the ratification of this controversial treaty,⁶² but also triggered public debate about the role of intellectual property in the information society.⁶³ Moreover, lobbying carried out by various interest groups led the Ministry for Administration and Digitization to promise to revise the entire legal system in order to ensure that Polish law would be able to respond to the growing needs of the information society.⁶⁴

The intensity of the anti-ACTA protests attracted the attention of social scientists, for Poland had not witnessed such mobilization since the collapse of the communist regime. Poles did not organize protests when the rest of the world was marching to protest against the war in Afghanistan and Iraq. There was no “Occupy Poland,” and Poles did not have their “Indignados” movement. Explanations of the anti-ACTA phenomenon in Poland range from the assertion that it was exactly this lack of previous reactions that led to the protests, for they gave vent to accumulated

⁶¹ See *Gazeta Wyborcza* and *Rzeczpospolita* of 20 January 2012 to 20 February 2012.

⁶² Ibid.

⁶³ Ibid.

⁶⁴ Ibid.

frustration,⁶⁵ to the assertion that secret negotiations about the treaty and the unclear position of the Polish government motivated people to think in terms of conspiracy theories and to protest even though they were not aware of the substance of the legal act against which they were protesting.

In my opinion, one of the most promising explanations of the anti-ACTA phenomenon in Poland concentrates on the analysis of social norms in terms of the distribution of cultural and knowledge goods. Research shows that only 13 percent of Poles buy books, music, or films. As many as 33 percent get hold of these products in digital form, in an informal manner and for free. This figure rises to 39 percent if “physical” forms of exchange are included in informal circulations, via the borrowing of books, CDs, and DVDs from relatives and friends.⁶⁶

If only the most culturally and socially active group (rather than the entire population) is taken account of, the percentage of people engaged in the informal circulation of knowledge and cultural goods increases. The Polish *cultural elite*, understood as persons who take greater interest in cultural and social life than the general population, corresponds more or less to the group of active Internet users, which means that the research done on this sample is very useful.⁶⁷ In 2011, 37 percent of Polish Internet users declared that they had been to the cinema, the theater or to a concert at least once in the previous month, in contrast to 6 percent of nonusers.⁶⁸ The Internet users declared that they bought three times more books and films and even seven times more music than their counterparts who do not use the Internet.⁶⁹ If we take into account the circulation of culture

⁶⁵ Ibid.

⁶⁶ Mirosław Filiciak, Justyna Hofmokl, and Alek Tarkowski, “Obiegi Kultury. Społeczna cyrkulacja treści,” Centrum Cyfrowe Projekt: Polska, Warsaw, January 2012, http://creativecommons.org.pl/wp-content/uploads/2012/01/raport_obiegi_kultury.pdf. This report is based on an opinion poll conducted from 20 September to 2 October 2011, which used a computer-assisted Web-based interviewing method applied to a representative sample of 1,283 Polish Internet users.

⁶⁷ The use of the Internet alone does not explain these dependencies. Internet users differ from nonusers in terms of their age, wealth, and educational background. This aggregate of variables explains why Internet users are more active in social and cultural life than nonusers. See Janusz Czapiński and Tomasz Panek, eds., *Diagnoza Społeczna 2009*, as well as Janusz Czapiński and Tomasz Panek, eds., *Diagnoza Społeczna 2011*, both available at <http://www.diagnoza.com>.

⁶⁸ Czapiński and Panek, eds., *Diagnoza Społeczna 2011*.

⁶⁹ Filiciak, Hofmokl and Tarkowski, “Obiegi Kultury.”

that requires no expenditure (the borrowing of books, CDs, or CD-ROMs, for example), the discrepancies between Internet users and nonusers is even greater: 88 percent of Polish Internet users participate in the informal circulation of music, 73 percent of them engage in the informal circulation of books and 78 percent of them in the informal circulation of films. The informal circulation referred to in this questionnaire was understood widely to mean downloading, using the content downloaded by other members of the family, copying from friends and family, and photocopying or scanning. If this data is aggregated, we find that 72 percent of Polish Internet users declare that they download files with cultural goods either from Web pages or from peer networks. If, in addition, we take account of streaming and the exchange of files with friends, the statistics show that 92 percent of Polish Internet users participate in this kind of circulation of cultural goods. And by taking account of the informal circulation of physical formats (via photocopying, scanning, and the exchange of books, CDs and DVDs, including copy versions, with family and friends), no less than 95 percent of users may be said to participate. More than 50 percent of active Internet users admit that the main reason why they engage in informal circulation is not the price barrier of the formal market, but the wider access to knowledge and cultural goods than that offered by goods that they could buy.

Moreover, 52 percent of the entire Polish population agrees with the statement that the free access to books, films, and music should be treated as a fundamental right even if it precludes copyright.⁷⁰

The data quoted above proves that Poles not only express strong social norms concerning the access to knowledge and cultural goods, but that they also act on them. These norms clash with the strong proprietary vision of intellectual and artistic creations that was very much present in the discourse favoring the introduction of ACTA.⁷¹

⁷⁰ Opinion poll conducted on 28 and 29 January 2012 on a representative sample of 1,003 Poles, by Millward Brown SMG/KRC. See "Protest w sprawie ACTA to walka młodych o wolność w internecie—potwierdzają wyniki badań," Centrum Cyfrowe, 31 January 2012, <http://centrumcyfrowe.pl/2012/protest-w-sprawie-acta-to-walka-mlodych-o-wolnosc-w-internecie-potwierdzaja-wyniki-badan/>.

⁷¹ For the sake of this chapter, the fact that ACTA does or does not significantly change the Polish copyright system is not relevant. What is important, however, is the fact that this treaty is associated with the strong proprietary vision under intellectual property rights' protection.

The following section, which has been inspired by evolutionary institutional theory, will outline the historical and cultural circumstances which contributed to the development of strong social norms favoring unrestricted access to cultural and knowledge goods among Poles, and which contradict not only the ACTA treaty but, more generally, the current international intellectual property regime that is based on a strong proprietary paradigm.

The first part of this chapter addressed three important phases, which might be considered as milestones in the development of law and technology in terms of the production and distribution of intellectual and artistic creations. Although these stages were universal and could be perceived throughout the world, they in fact evolved at different moments in time, and in different circumstances in various countries.

In the following section, I will focus on the same three phases, while highlighting additional aspects of the environment in which both Polish copyright law and respective social norms evolved that were *not* present in Western European countries, and that might have contributed to the strong demand for unrestricted access to knowledge and culture goods among the Polish population.

The Advent of Print and the Birth of Copyright Law: The Introduction of the Proprietary Paradigm?

Poland was one of the first countries to grant privileges protecting the interests of publishers, at the same time as the cost of printing declined so drastically that the circulation of unauthorized reprints began to flourish. The first privilege was granted to a Polish publisher as early as 1494.⁷² The Polish system of privileges was twofold because it consisted of privileges granted by both secular and ecclesiastical authorities.⁷³ This system developed continually. By the middle of the sixteenth century, a system of international protection was developed as the protection granted according

⁷² Artur Benis, *Ochrona praw autorskich w dawnej Polsce. Pamiętnik Słuchaczy Uniwersytetu Jagiellońskiego Wydany Staraniem i Nakładem Młodzieży Akademickiej Na Uroczystość Otwarcia Collegii Novi* (Kraków: Drukarnia Uniwersytetu Jagiellońskiego pod zarządem A.M. Kostekiewicza, 1887), 444.

⁷³ The main difference between these two types of privileges was the fact that ecclesiastical privileges covered only a particular edition, such that publishers had to apply for protection every time they wanted to reprint another edition of the same work.

to Polish privileges was expanded to imported books written in Hebrew, Greek⁷⁴ and Czech.⁷⁵ The privileges ensured that imported books would be treated in the same way as Polish ones in terms of their scope and terms of protection. Moreover, some privileges granted protection against the unauthorized reprint of translations.⁷⁶ Some privileges were even granted directly to authors rather than to publishers,⁷⁷ and protection was extended generally to all kinds of artistic works, that is, not only books.⁷⁸ According to legal doctrine, these privileges belonged to the domain of private law and were therefore enforced only on behalf of right holders.

By the second half of the eighteenth century, privileges had already been standardized according to the customary law of the time. They granted twenty years of protection against unauthorized reprint, translation, compilation, the alteration of a work and the export of similar or identical works. The sanction amounted to a financial fine, half of which was paid to the right holder, the other half to the treasury.⁷⁹

First attempts to regulate copyright in a single general legal act that would replace the system of privileges were made in 1776 and 1784.⁸⁰ However, parliament did not pass the law and so lost the opportunity to introduce the first Polish copyright act. At that time, Poland was partitioned between Russia, Austria and Prussia, which meant that all copyright issues arising on Polish land soon had to be regulated by three various copyright acts originating in the three legal systems of the respective states.

This period of Polish legal history was characterized by the fact that, although Poland did not have a single universal copyright act, the well-developed system of privileges emerged quite early. The privileges responded to the need to protect not only books, but also other artistic creations, provided protection not only for national creations but also for imported and translated works, introduced a sanction that both covered damages

⁷⁴ Increased interest in religious studies meant that Greek and Hebrew were widely studied in Poland at that time. See Benis, *Ochrona praw autorskich w dawnej Polsce*, 453.

⁷⁵ At that time, Czech was widely spoken by the Polish elites.

⁷⁶ Benis, *Ochrona praw autorskich w dawnej Polsce*.

⁷⁷ Ibid.

⁷⁸ Ibid., 455.

⁷⁹ Ibid., 459.

⁸⁰ Ibid.

and discouraged future breaches, and acknowledged the unique role of the author distinct from that of the publisher. The initial development of copyright law in Poland, before the change from a system of privileges to the protection granted in the general legal acts, did not greatly differ from what took place in Western Europe. Moreover, the system of privileges enabled Poland to be one of the very first nations to protect the fruits of human creation in this part of Europe.

Nevertheless, the Polish case was marked by particularities from the moment at which first modern copyright acts were introduced on Polish soil.⁸¹ Not only did regulations stem from three different legal systems; they were imposed by the occupants' hostile authorities and strictly connected with the system of censorship, which targeted Polish patriotic and proindependence movements in the territory of partitioned Poland.

In Austria, preventive censorship successfully impeded both the circulation of and access to Polish works from 1781.⁸² Decisions made by censors were irrevocable and directly interfered with the integrity of the work, for censors deleted words and phrases forbidden by the law and replaced them with random expressions.⁸³

The situation was very similar in the Kingdom of Prussia where, from 1849 onward, all texts printed in Polish could only be published and imported from abroad if accepted by the censors. The intensity of the censorship ensured that the legal circulation of Polish works (especially literature and press publications) in Prussia was almost inexistent.⁸⁴

The most severe restrictions, however, were imposed by the system of censorship in Russia, which very actively blocked not only the circulation of Polish books and articles, but also music, paintings, theater and opera performances. Among the authors whose works were either completely

⁸¹ The first copyright regulations in the Polish territory incorporated into Austria were enacted in 1811, in the parts partitioned by Russia in 1828 and in the Prussian part in 1835. See Ewa Ferenc-Szydełko, *Prawo Autorskie na ziemiach polskich do 1926 r.* (Prace z Wynalazczości i Ochrony Własności Intelektualnej, Zeszyt 75) (Kraków: Zeszyty Naukowe Uniwersytetu Jagiellońskiego, 2000).

⁸² Ibid., 225.

⁸³ Ibid., 226.

⁸⁴ A very famous case of a publisher from Poznań, who was not allowed (under the sanction of arrest) by the censors to sell the series of postcards and photographs by Artur Grottger titled *Polonia* and *Lithuania* proves that the slightest patriotic message in a Polish work was enough to lead to a ban on the work from official circulation. See *ibid.*, 225.

banned or seriously changed by the Russian censors were two Polish Nobel Prize laureates in literature (Henryk Sienkiewicz and Władysław Reymont), the famous composer Stanisław Moniuszko, the bard of Polish patriotic lyrics Adam Bernard Mickiewicz and many other prominent creators. The interference of censors with original works was so intrusive that often authors could barely recognize their own creations once they had been cut and modified.⁸⁵ This power of the censors conflicted not only with the right to the integrity of the work, but also almost reduced authors' earnings to nothing, because at that time authors were remunerated by publishers in proportion to the size of the work. As a result, works that were cut by half or more by the censors earned very little money for the author. The severe sanctions forced those creators who did not want to compromise their works and were courageous enough to object to the conditions of censorship to publish their works under pseudonyms or anonymously. This meant that even the right to paternity of a work was somewhat biased.

Thus the strength of the censorship system in all three territories of partitioned Poland rendered copyright protection with regards to Polish creators fictitious, even if legal acts regulating copyright issues treated an author as the primordial subject of copyright protection.⁸⁶ The power of censors to block the distribution of original works, including pieces created by prominent Polish creators, also led to the emergence and rapid expansion of illegally circulated Polish literary, artistic and knowledge goods.

In these circumstances the social norms favoring unrestricted access to intellectual creations flourished, especially in light of the fact that literature and art were key supports of Polish national identity, which was constantly suppressed by the hostile authorities. As copyright law frequently failed to secure real protection for the Polish creators, and because many of them treated their occupation as a mission in the fight for independence, authors favored wide access to their works. The debate about "literary property" that had been powerful in England and France did not have

⁸⁵ Ibid., 227.

⁸⁶ The German Copyright Act 1837 defines the author as the primordial subject of copyright. § 1 of the act states that the right to reproduction and distribution (including remuneration for the distributed works) belongs "solely to the author" (*nur dem Autor derselben*). Although similar wording was not included in the first Austrian or Russian copyright acts, the regulations as a whole proved that an author was meant to be the pivot of the protection system (rather than a publisher, as previously stipulated in the privilege system).

its equivalent among the Polish elites. Moreover, even in the legal doctrine of that period the voices opposing the proprietary vision of copyright protection, which criticized the “literary property” concept from abroad, and favored the wide access to art and knowledge were prevailing.⁸⁷

Unlike in many Western European countries, therefore, the situation on Polish territory was not conducive to the acceptance of the proprietary paradigm and rather favored the concept of open access to knowledge and art. The message conveyed via literary and artistic works was then perceived to be the most important part not only of the creation, but also of the distribution process, and every effort was made to make it reach the widest possible audience. Although strongly opposed to plagiarism,⁸⁸ social norms emerging at that time did not condemn the unofficial and often illegal circulation of knowledge and artistic goods.

The Introduction of Technologies That Facilitate Mass Consumer Copying: First Attempts to Strengthen the Proprietary Paradigm?

Social norms promoting wide access to culture and knowledge, and which accepted the unofficial and often illegal circulation of intellectual and artistic creations, met with favorable conditions in Poland also in the second phase of the development of mutual interactions between technology and copyright norms, as analyzed in this chapter. At a time when Western European democracies strove to find a balance between the needs of consumers who had been empowered by reproduction technologies and the demands of right holders who desired full control of copyrighted works, the informal distribution of cultural and intellectual creations flourished in Poland once again.

Although the general political situation had changed drastically since the end of the historical period analyzed above, censorship was again very much present in the communist period and played a similar role in sustaining social norms that favored wide access to culture and knowledge, just as had been the case during the Polish partitions.

⁸⁷ See, e.g., Antoni Górski, *W kwestyi własności literackiej* (Warsaw: Biblioteki Warszawskiej, 1891).

⁸⁸ Ferenc-Szydelko, *Prawo Autorskie na ziemiach polskich do 1926 r.*

At the time when the first technologies allowing for the reproduction of copyrighted materials by consumers—namely analogue recorders—were introduced, Poland was cut off from the Western world by the Iron Curtain. Censorship did not allow people to import most Western cultural and knowledge goods, and prevented “harmful” trends from being imitated in socialist Poland. “Big-beat” was banned by the Polish censors not only as a genre of music, but also as a word. Wearing clothes that adhered to Western fashions could be perceived as a revolutionary act, and simply wearing colorful socks in the 1950s could lead to a cruel interrogation by the security forces. Obviously, these facts triggered resistance, especially on the part of young people. One of the methods of opposing the regime, and more importantly of trying to live a normal life, involved gaining access to forbidden cultural creations, represented mainly by music.

Radio Luxembourg, the commercial multilingual radio station based in Luxembourg, shaped the music tastes of young people around Europe, and played a major role in the emancipation of many Polish teenagers growing up in communist Poland. Although forbidden from listening to this radio station, most youngsters ignored the ban, and not only listened to but also recorded broadcasts with reel-to-reel audio tape recorders.⁸⁹ The political thaw introduced another source of music recordings—the Polish Radio Program 3. Although it was a public, state-owned radio station, it enjoyed a degree of autonomy in line with the “vent” strategy of the Communist Party, which granted some freedoms in the least important spheres of social life in order to protect itself against political revolution. Program 3 introduced broadcasts that were tailored to the recording activities of the audience. The speaker presented a list of popular Western songs and counted down before each track so that the members of the public knew when to start recording. Music recordings from these radio stations were one of the most demanded goods in the informal market, where both sale and exchange contracts were concluded. Social esteem and status among young people in communist Poland were proportional to the number of Western musical recordings owned. Most of them had been either recorded from the radio stations or copied from friends.⁹⁰

⁸⁹ In Polish: “magnetofon szpulowy.” See, e.g., Wojciech Mann, *Rock Mann czyli jak nie zostałem saksofonistą* (Kraków: Wydawnictwo Znak, 2010).

⁹⁰ Only rarely did recordings originate from an illegal import.

The 1970s witnessed also the expansion of the informal circulation of the written word. Books, articles, and short leaflets with political messages were mass reproduced with the use of homemade duplicating machines⁹¹ and distributed via illegal chains. This phenomenon was so widespread that it was called “second circulation,”⁹² in contrast to the official distribution of cultural and knowledge goods approved by the state censors. Between 1976 and 1980 “second circulation” provided a haven not only for political opposition, but also for artistic creations that would have been impossible in the “first” or official circulation.⁹³ The phenomenon of “second circulation” was a familiar component of the collective consciousness of the Polish intelligentsia by the 1970s, and became increasingly popular among the working class. Information acquired via informal chains of distribution enabled people to develop critical insights into the situation in Poland and abroad that were not possible via official news. Moreover, “second circulation” was complimentary to “first circulation” insofar as it provided spaces for works of art and literature that had been forbidden by censors, and thereby offered a genuine gateway to Western culture.⁹⁴

The phenomenon of “third circulation” emerged in the early 1980s. “Third circulation” was a publishing and distributing movement run by the younger generation, and which arose from alternative subcultures consisting mainly of punks who opposed both the “first” political mainstream and the “second” oppositional movements. “Third circulation” did not only oppose communist ideology, but also rejected conservative art, which the younger generation dismissed as a form of compromise with the communist authorities. It involved unofficial distribution of tape recordings, texts and graphics. “Third circulation” was not as structurally well organized as the “second” in terms of publishing and distribution chains. The works were circulated primarily at concerts, festivals, and ad hoc meetings of members of subcultures. As the emergence and existence of “second circulation” was connected to the technological novelty of duplicating machines and reel-to-reel audio tape recorders, “third

⁹¹ In Polish, the famous “*powielacze*” that played an important role in the resistance movement against communism.

⁹² In Polish: “*Drugi obieg*.”

⁹³ See, e.g., Mirosław Pczak, “Kilka uwag o dwóch obiegach,” *Więź* 2, no. 352 (1988): 29.

⁹⁴ *Ibid.*

circulation” was born with the aid of photocopying machines and cassette decks. The form of the circulating works also evolved out of these technological novelties. Whereas people involved in “second circulation” did not learn how to use these inventions and continued to distribute mainly short leaflets because they could be conveniently copied on duplicating machines, “third circulation” focused on the distribution of cassette tapes containing alternative music recorded during live concerts or copied from master copies and fanzines. These nonprofessional and nonofficial publications devoted to alternative culture were sold mainly by post for the cost of delivery. The novelty of photocopying made it possible not only to produce much longer publications than the ones distributed via “second circulation,” but also to include more interesting graphics and apply an attractive layout.⁹⁵ In the 1980s, fanzines distributed via “third circulation” reached tens of thousands of young Poles aged between seventeen and twenty-seven.⁹⁶ Central to both “third circulation” and “second circulation” was the fact that they were nonprofit enterprises designed to achieve the widest possible dissemination without financial gain. Needless to say, both “second” and “third” circulations were not only unofficial, but also illegal, because they operated outside the censoring system.

Although alternative cultural movements like punk subculture, which involved the unofficial distribution of cultural goods, also existed in Western Europe (especially in the UK) and in the US, this phenomenon was much more influential in Poland, where it was linked to political opposition among younger generations who were tired with the communist regime and with what they perceived to be an inefficient “elder” opposition, which relied on “second circulation.” The fact that involvement in the unofficial distribution of cultural and knowledge goods was prohibited by censorship laws and therefore implied the risk of incurring criminal sanctions, including imprisonment, did not discourage but rather added flavor to these activities, transforming them into what resembled a civil disobedience movement. The influence of acts of civil disobedience on the creation and sustainment of social norms is well known and cannot be

⁹⁵ See, e.g., Paweł Dunin-Wąsowicz, “Inny Obieg,” http://www.zinlibrary.pl/index.php?option=com_content&view=article&id=15%3Ainny-obieg&catid=11%3Ao-zinach&Itemid=3&fe0c5785f673d3794b20f9d4b6f1b88a=e89b83c989def4629733fbccf44dd8b3.

⁹⁶ Ibid.

underestimated. The power of both forms of unofficial Polish “circulations” to reinforce social norms favoring unrestricted access to intellectual and artistic creations is therefore not surprising.

At a time when the Western world was discussing the danger that new technologies might disrupt the copyright regime, epitomized by well-known slogans such as “Home taping is killing music. And it is illegal,” the majority of Polish people were involved in illegal circulations of cultural and knowledge goods, treating it as way of combating the hostile political regime. Whereas the West referred to unauthorized distribution as “theft” in the 1980s, from the 1960s to the early 1990s at least two generations of Poles perceived the unofficial circulation of music, literature, and press as a virtue that provided access to objective information and served as a gateway to Western culture in the captive nation. Public debates about the limits of copyright monopoly triggered by the invention of new technologies of reproduction in Western countries in the 1960s, which continued into the 1980s and 1990s, were unknown in Poland at that time. Even the levy system, which resembled an attempt to maintain a fragile balance between the interests of various interest groups, was introduced in Poland only in 1994.⁹⁷

In these circumstances, social norms in favor of the wide dissemination of cultural and knowledge goods, that were already rooted in Polish culture, were further reinforced and shared by an increasing number of Poles.

The Digital Era—Absolute Property?

As the above analysis shows, when Poles entered the digital era they had already acquired social norms approving of the wide dissemination of cultural goods, even if such activity was against the official laws. Unlike Western countries, where young people shunned compliance with copyright laws in response to the power given to them by new technology, in Poland the phenomenon of unofficial and illegal circulation of cultural goods dated back hundreds of years and therefore was as familiar to elder generations as to teenagers. Internet and digital technologies used for the reproduction and dissemination of copyrighted materials were merely a more advanced form of technology that replaced tools used in the past. Poles not only did not develop social norms opposing the unauthorized

⁹⁷ Introduced by the Copyright Legal Act in 1994: Prawo autorskie z 1994 r.

distribution of cultural goods; they did not internalize the proprietary vision of cultural and knowledge goods. For in Polish history the incentive to create was not driven by private ownership and financial gain, but by the ability to convey important messages to the public.⁹⁸ Another reason why copyright law did not become internalized as in other countries is the fact that it rarely offered any significant protection to Polish creators. Moreover, Poland did not witness major public discussions about the nature and function of intellectual creations and the scope of their protection, which had taken place in Western societies in both of the historical periods analyzed above and facilitated the evolution of social norms that would comply with copyright regulations. In fact, the ratification of the ACTA treaty was the first event to trigger public debates on this topic; therefore it is not surprising that the dispute escalated, because it revived a deeper vital conflict between imposed international regulations and strongly internalized social norms.

In addition to the sociohistorical explanation, the *spirit* of present-day Polish copyright law probably influenced both the development of particular social norms with regard to this branch of regulation and the negative public reaction toward the ACTA treaty.

First, Polish copyright law stems from the European continental tradition, which justifies legal regulation in this sphere of social life in terms of *personality rights* to intellectual creations, as developed by Immanuel Kant and Georg Hegel. This paradigm, which treats the concept of *moral rights* as the pivot of the whole copyright protection, differs significantly from its common-law counterpart, which is based on a strong proprietary approach to copyright justified by a mixture of utilitarian/instrumentalist philosophy and the conception of property as natural right, defended by John Locke.⁹⁹

The main difference between these conceptions of copyright being that the perception of knowledge and culture goods as sheer commodities comes as much more naturally in the common-law systems than it does in the case of continental law. Hence the approach to copyright law as an

⁹⁸ This vision is still strongly reinforced in Polish schools, where literature and art generally are described as the carriers of national identity used in the fight for independence.

⁹⁹ See Barbosa, "The Philosophical Approaches"; Netanel, "Copyright Alienability Restrictions"; Justin Hughes, "The Philosophy of Intellectual Property," *Georgetown Law Journal* 77, no. 287 (1988), 296–314.

instrument of trade policy, as instantiated both by the TRIPS and ACTA agreements, is less controversial in common-law countries than in the *moral rights* systems, such as the Polish copyright regime.

Second, the institution of *permissible personal use* in Polish copyright law is regulated in a very liberal way, which undoubtedly shapes expectations of the general public toward the broad access to cultural goods, and may partially explain why the anti-ACTA movement started in Poland and why ratification of the treaty met with such resistance there. For the potency of copyright regulations is not exhausted in the establishment of a direct normative plan and purely legal operations, but “also stems from the power of legal rules to determine discourse, which in turn determines thought,”¹⁰⁰ as Neil Netanel has stated.

Consequently, the strong social norms favoring unrestricted access to culture and knowledge in Poland should not be perceived as an entirely new phenomenon triggered by the digital revolution, but as a general cultural inclination which evolved over time out of specific historical developments and the *spirit* of Polish copyright law.

By applying evolutionary institutional theory we may conclude that the strong proprietary vision imposed universally via recent international treaties, which do not take into account local developments, necessarily clashes with social norms that evolved out of particular historical experiences. The one-size-fits-all formula will never be effective in diversified world. Law that is detached from social reality will fail to regulate human behavior, no matter how severe it is, because mechanisms of civil disobedience (whether they are justified or not) encourage individuals to embrace revolutionary behavior or even martyrdom, as observed in the Pirate Bay case, where the accused managed to present themselves as heroes fighting for a just cause while exhorting Internet users to follow suit.

¹⁰⁰ Netanel, “Copyright Alienability Restrictions,” 442.

Follow-up to the Anti-ACTA Protests in Poland: The Round Table on the Role of Copyright Law in the Information Society

As a result of historical conditions and the *spirit* of national legal regulations that shaped Polish social norms governing access to knowledge and culture, the *political salience* of copyright in the digital environment is much more pronounced in Poland than in other European states. Undoubtedly, the idea that the ACTA treaty was in fact an injurious imposition by the American legal regime, as was reported by many protesters, resonates well with the long-standing Polish resistance to foreign power interventions in home affairs and added up to the conflict with the social norms.

Both these inferences led the Polish Ministry for Administration and Digitization to react to public discontent expressed in the anti-ACTA protests. First, the ministry sent its representatives to the Forum on the Freedom in the Internet, which was spontaneously organized by opponents to the ACTA treaty following the street protests. Second, the ministry organized a round table with interest groups to negotiate a compromise with regard to copyright law that would comply with international law while at the same time satisfying conflicting interests in the information society.

The round table adhered to the rule of complete transparency, according to which all those interested in participating were obliged to disclose their interests and affiliations, while representatives of organizations also had to disclose the source of their organizations' funding. Moreover, the negotiations were open to the public and reported in detail online. The final reports from the negotiations are publicly available on the wiki platforms, where readers may make corrections.

The negotiations brought together various interest groups, including inter alia the representatives of authors and creators, collecting societies, intermediaries of the market in copyrighted goods, nongovernmental organizations advocating freedom on the Internet and free access to culture and knowledge, and focused on the three proposals drafted by leading academic experts of the Polish copyright doctrine.

The four rounds of negotiations that have taken place so far have shown that the most burning issues that interest all sides are: the clause on private use and its application in the digital environment, remuneration for the

use of content material on the Internet, and the application of the three-step test within the national copyright act. Surprisingly, although they had been triggered by the aggressive discourse of the initial street protests, the negotiations went smoothly and promised a compromise between the conflicting interests of various groups.

The arrangements made so far show that liberal Polish provisions on private use might be further modified in a “user-friendly” mode, presuming that a compromise concerning the remuneration for the use of content material on the Internet will be found. The most immediate reform is expected to remain within the current international regime, and have recourse to all available exceptions. Nevertheless, later negotiations gave rise to the suggestion that Poland might be willing to start a campaign to renegotiate some international treaties so that they reintroduce the lost balance of interests protected by the copyright regime,¹⁰¹ as this is the only way to restore the law’s capacity to regulate human behavior in the field of the distribution of artistic and intellectual creations.

Conclusion

As a result of historical developments, including the experience of communism and the transition to capitalist democracy, Polish society has reacted much more strongly than Western societies to the current crisis of copyright law in the digital era, which is epitomized by the battle against the ACTA treaty. Interestingly, the Polish government understood the *high political salience* of the “ACTA conflict” and reacted to the social dissent by applying the proven method used in Poland in the transition period, that is, round table negotiations. This method was consistently promoted by Neelie Kroes, the European Commissioner responsible for the Digital Agenda in Europe, who claimed that open public dialogue is the only way to achieve a compromise in the conflict between various interest groups in the digital environment that would assure compliance with copyright law. So far, however, most decisions regarding copyright law in the European

¹⁰¹ All reports from the proceedings of the round table on the reform of intellectual property law in Poland are available on the Internet. See: http://warsztaty.mac.gov.pl/prawo_autorskie/doku.php?id=warsztat_2520prawo_2520autorskie.

Union have been taken in line with the logic of *quiet politics*, where the low salience of the issue and the general public's inability to change the law favors lobbying by small but strong interest groups.

The Polish case may set a positive example for other European states facing challenges of the rapidly changing needs of the digital environment, in which the "Commodification of Knowledge and Culture Project" is not a universal solution. Nevertheless, social norms will lead to a change in the law only if the general public maintains consistent interest in the case. *Temporary political salience* alone will not suffice to do this, and could again drive end users who are dissatisfied with the law to avoid burdensome regulations and develop a profound disrespect for the law.

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